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RESPONSIBILITY DETERMINATIONS ON DEPARTMENT OF DEFENSE  
ENVIRONMENTAL CLEANUP CONTRACTORS: CAVEAT VENDORI?

By

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RESPONSIBILITY DETERMINATIONS ON DEPARTMENT OF DEFENSE  
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INTRODUCTION

In an era of shrinking military budgets and heightened environmental accountability, the U.S. Department of Defense must be concerned with maximizing the impact of each dollar spent on environmental remediation projects. With the dissolution of the Soviet nemesis and the pending reordering of our nation's defense priorities, the United States' military is afforded the opportunity to address the environmental legacy of more than half a century of military buildup.

The military has taken on the task of cleaning up old hazardous waste sites, decommissioned military sites, old munitions stockpiles, and cleanup of industrial-like pollutants. This effort requires a long term commitment coupled with perseverance and diligence. It requires planning and funding. It usually requires the assistance of someone with experience and expertise at what, in the vernacular, is called "moving dirt".

Selecting someone to "move dirt" at Department of Defense (DOD) sites is the task of the various DOD contract agencies. The task requires a melange of seemingly incompatible environmental and procurement regimens, each operating under the auspices of different statutes, each with its own acronym-laced jargon. The challenges of contracting<sup>1</sup> for environmental services are numerous. In the recent past much attention regarding the Federal Government's efforts to acquire<sup>2</sup> environmental cleanup services have focused on relatively few specific areas of concern. Among these areas of concern are reimbursement of contract costs associated with environmental compliance and the associated desire of industry for indemnification<sup>3</sup>, the unique liability problems of

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<sup>1</sup> "Contracting" means purchasing, renting, leasing, or otherwise obtaining supplies or services from nonfederal sources. Federal Acquisition Regulation (hereinafter FAR) 2.101.

<sup>2</sup> "Acquisition" means the acquiring by contract supplies or services (including construction) by and for the Federal Government through purchase or lease using appropriated funds. FAR 2.101. "Acquisition" and "procurement" are used synonymously in the course of this discussion.

<sup>3</sup> See Environmental Costs Allowability Detailed in Audit Guidance, Govt. Cont. Rpt. (CCH) ¶ 99,594 (Nov. 18, 1992); Allowable Costs: Environmental Cost Principle Cleared For Issuance as Proposed Rule, 58 Fed. Cont. Rpt. (BNA) 184 (Aug. 17, 1992); ABA Section Comments On DAC-91-2 Regarding Hazardous Waste Liability & Indemnification, 34 Govt. Contr. ¶ 311 (June 3, 1992); Marc F. Efron, Devon Engel, Government Indemnification for Environmental Liability, 92-11 B.P.C. 1 (Oct. 1992); John F. Seymour, Liability of Government Contractors for Environmental Damage, 21 Pub. Cont. L. J. 491, 525 (1992); Peter A. McDonald, Scott P. Isaacson, Environmental Costs for Government Contractors: Gordian Knot Redux, 57 Fed. Cont. Rpt. (BNA) 847 (June 1, 1992); Jerry A. Batschi, Lynda Troutman O'Sullivan, Recovery of Environmental

contractors at government owned/contractor operated (GOCO) facilities<sup>4</sup>, viability of the "government contractor defense"<sup>5</sup>, and enforcement actions against government contractors engaged in the environmental construction and services industry<sup>6</sup>.

In addition to these cutting-edge issues impacting environmental services acquisitions, contract agencies have the more prosaic task of selecting a prospective awardee that

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Prevention & Cleanup Costs by Government Contractors, 32 Cont. Mgmt. 20 (Apr. 1992); Draft Environmental Cost Principle Stalled in CAAC, 57 Fed. Cont. Rpt. (BNA) 669 (Mar. 4, 1992); Robert T. Lee, Environmental Liability: "Uncertain Times" for Government Contractors, 23 Natl. Cont. Mgmt. J. 45, 47 (1990), 27 Y.P.A. 787; C. Stanley Dees, Tami Lyn Azorsky, Environmental Clean Up Costs, 421 ALI-ABA 225 (Apr. 5, 1989).

<sup>4</sup> E. David Hoard, Environmental Issues In Government Contracting, 32 Cont. Mgmt. 8, 11 (Apr. 1992); Marcia G. Madsen, Thomas F. Williamson, Glenn G. Wolcott, Management Contractors & Environmental Damage: Who Shall Pay?, 37 Fed. B. N. & J. 601 (1990), 27 Y.P.A. 1727; Laurent R. Hourcle', Robert Lingo, Francis H. Esposito, Environmental Law in the Fourth Dimension: Issues of Responsibility & Indemnification With Government Owned-Contractor Operated Facilities, 31 A. F. L. Rev. 245 (1989); Margaret O. Steinbeck, Liability of Defense Contractors for Hazardous Waste Clean Up Costs, 125 Mil. L. Rev. 55, 58 (1989); Lee, supra note 3, at 46.

<sup>5</sup> R. Joel Ankney, But I Was Only Following Orders: Government Contractor Defense In Environmental Tort Litigation, 32 Wm. & Mary L. Rev. 399 (1991); Madsen, supra note 4, at 602; Lee, supra note 3, at 50.

<sup>6</sup> Judson W. Starr, Avoiding the Government's Tough New Criminal Enforcement of the Environmental Laws, 776 ALI-ABA 1 (Sep. 17, 1992); Joseph G. Block, Environmental Criminal Enforcement in the 1990's, 3 Vil. Univ. L. J. 33 (1992), reprinted in 776 ALI-ABA 87 (Sep. 17, 1992); James N. Strock, Environmental Criminal Enforcement Priorities for the 1990's, 59 Geo. Wash. L. Rev. 916 (Apr. 1991); Roger J. Marzulla, Brett G. Kappel, Nowhere to Run, Nowhere to Hide: Criminal Liability for Violations of Environmental Statutes in the 1990's, 16 Colum. J. Envtl. L. 201 (1991).

can and will perform its contractual duties. This task is not unique to environmental source selections. It is an inherent duty of the contracting officer<sup>7</sup> in every acquisition, regardless of the nature of the services or product being obtained, to enter into contractual agreements only with firms that are responsible<sup>8</sup>.

Determinations of contractor responsibility take on additional significance in the environmental source selections. With the stakes of liability so high and open ended the government should be reluctant to enter into contractual liaisons with firms that do not have the present capability or willingness to perform the cleanup tasks in a manner that complies with the requisite standards and regulations. The greater the doubt concerning the contractor's responsibility, the greater the risk for the Government. As high profile remediation projects, such as the

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<sup>7</sup> "Contracting Officer" refers to a person with the authority to enter into, administer, and/or terminate Federal contracts and make related determinations and findings. FAR 2.101. Contracting Officers may bind the Government only to the extent of the authority delegated to them. FAR 1.602-1(a). COs are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships. FAR 1.602-1. See also FAR 1.603-2 & FAR 1.603-3.

<sup>8</sup> FAR 9.103(a). For an excellent discussion of selecting responsible contractors for services or supplies, other than environmental remediation, see James L. Conrad, "BUYING GREEN": IMPLEMENTATION OF ENVIRONMENTALLY-SOUND PURCHASING REQUIREMENTS IN DEPARTMENT OF DEFENSE PROCUREMENTS (1993) (unpublished LL.M. thesis, The National Law Center, The George Washington University).

Rocky Mountain Arsenal in Colorado, focus attention on the DOD's environmental policies, renewed attention will be paid to how the Government selects its remediation contractors and whether the Government can do more to filter out prospective contractors who lack the capacity and willingness to perform environmental services in accordance with the contract.

This paper will attempt to combine and reconcile aspects of environmental law and Federal acquisition law, a task once likened to "an unnatural attempt to mate two different species."<sup>9</sup> One goal of this effort is to establish a common ground of reference for personnel who work in the Federal environmental and acquisition arenas. As a result, some portions of this paper may be very basic for readers experienced in either the environmental or contracting discipline, while other portions may be totally foreign. Hopefully, this effort to examine the interrelationship of the two disciplines will provide an impetus for discussion among those who labor in the acquisition and environmental fields.

The specific purpose of this paper is to review the process by which the DOD contracting agencies determine whether prospective contractors on environmental remediation efforts and other environmental services have the requisite responsibility for award, and to examine whether the Government should be more aggressive in the process. Part I of this paper is a brief introduction to the nature and scope

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<sup>9</sup> Hourcle', Lingo, Esposito, supra note 4, at 245.

of the environmental cleanup associated with U.S. military sites and the DOD commitment to the cleanup effort. Part II explains how the DOD implements the relevant environmental statutes through the Defense Environmental Restoration Program. Also, Part II explores how the DOD agencies conduct source selections for environmental construction and services. The first section of Part III is a primer on the generic concept of responsibility and the source selection process. It is designed to introduce those readers who are unfamiliar with the acquisition process to the concept of "responsibility" as it relates to a bidder/offeror's eligibility for award of a Federal Government contract. Also in Part III, the role of responsibility determinations in sealed bids and negotiated/competitive source selections is compared and contrasted. In the second section of Part III the individual elements of "responsibility" are examined with special emphasis on how the responsibility determination affects the procurement process for environmental cleanup projects. Part IV discusses some possible methods to augment the contracting officers' (hereinafter CO) authority to determine a prospective contractor's responsibility. These methods include prequalification of contractors on the basis of responsibility, expanded use of suspensions and debarments for noncompliance with environmental laws and regulations, creation of a computer data base for compiling a master source of performance data on contractors that have performed

environmental construction or service contracts, and expansion of the architect-engineering style of source selection for remediation projects. By way of comparison, the defense agencies' ability to perform remediation or corrective action in-house will be examined. This paper will conclude with the suggestion that Federal contracting agencies currently have the necessary tools to perform the responsibility determination in environmental procurements. While some improvements can be made, the onus remains on the contracting officer to make it work.

## PART I

### THE NATURE OF THE PROBLEM

Since the earliest recorded days of our western culture nation-states have developed military assets with unintended, yet profound, impact on the ecosystem<sup>10</sup>. For most of the

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<sup>10</sup> By the early part of the fourth century B.C. the region of Attica was deforested in an effort to supply timber for the increasing demand of Athens' naval fleet. Deforestation led to progressive soil erosion which produced the barren limestone landscape that is now associated with that area of Greece. Peter Green, *ARMADA FROM ATHENS*, 15 (1970); Will Durant, *THE LIFE OF GREECE*, 268 (1939). See also Plutarch's *LIVES*, reprinted in part in *THE RISE AND FALL OF ATHENS: NINE GREEK LIVES*, 80 (Ian Scott-Kilvert trans., 1960). See generally H.D.F. Kitto, *THE GREEKS*, 113 (1951); C.E. Robinson, *HELLAS: A SHORT HISTORY OF ANCIENT GREECE*, 62 (1962); Clive Ponting, *Historical Perspectives on Sustainable Development*, 32 *ENVT.* 4, 8 (Nov. 1990). For the perceptive reader, history is full of other examples where environmental resources were sacrificed for military prowess. For instance, the birth of

next two millennia the effect on the ecosystem remained unnoticed or was ignored. A significant change began with the industrial revolution. The concentrated phase of industrialization that began in the late 18th century brought about a change in the scale, intensity, and variety of water and airborne pollutants in North America and Europe<sup>11</sup>. Since the Second World War there has been a significant change in the industrial processes and in the types of pollution produced<sup>12</sup>. Pollution rose faster than the increase in

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America's lumber export industry can be traced to the Colonies' exchange of timber, as well as other crops, to the Dutch colonies in the Caribbean for naval and military supplies during the early 1770's. Barbara W. Tuchman, *THE FIRST SALUTE: A VIEW OF THE AMERICAN REVOLUTION*, 20, (1988). In another example, the U.S. effort to carve a canal across the Isthmus of Panama was driven in part by the strategic desire to provide easier accessability between the U.S. Navy's Asian and Atlantic Fleets. The construction of the Panama Canal entailed excavation & disposal of more than 262 million cubic yards of rock & mud and the clearcutting and flooding of 164 square miles of tropical rain forest. The full impact of this effort on the flora, fauna, & people of the region has never been documented. David McCollough, *THE PATH BETWEEN THE SEAS: THE CREATION OF THE PANAMA CANAL*, 253-55, 489, 581, 611 (1977). In a final example, the economic expansion that was stimulated by the United States' participation in World War I led to increased air emissions from industry's smokestacks. The necessities of the time stifled the embryonic movement to regulate & control air pollution. Air pollution became associated with patriotism. Arnold W. Reitze, Jr., *A Century of Air Pollution Control Laws: What's Worked; What's Failed; What Might Work*, 21 *Envtl. L.* 1549 (1991).

<sup>11</sup> Clive Ponting, *A GREEN HISTORY OF THE WORLD*, 361 (1992). It is reported that atmospheric concentrations of heat trapping carbon dioxide have increased 25 % since pre-industrial times. This has contributed to the highest levels of carbon dioxide in the atmosphere in over 160,000 years. *Forum: Can the Earth Survive?*, Anchorage Daily News, 17 May 1992, at J-1.

<sup>12</sup> Ponting, supra note 11, at 369.



population or the increase in material consumption in the industrialized world<sup>13</sup>. By 1945 most of the industrial pollution came from two main sources: the burning of fossil fuels and the production of iron, steel, and other metals, and chemicals<sup>14</sup>. After 1945 industry increasingly manufactured synthetic chemicals that are highly toxic and inorganic<sup>15</sup>. These synthetic chemicals are resistant to degradation by natural processes, so they accumulate in the environment<sup>16</sup>. As is well known, military and defense related construction expanded drastically during the Second World War and continued into the Cold War era, thereby contributing to the present state of the environment<sup>17</sup>.

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<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> The Cold War's environmental legacy is not limited to our shores. The Science for Peace Institution of the University of Toronto is reported to have announced, "globally the U.S. and the Soviet armed forces produce the greatest amount of hazardous waste" and "the world's armed forces are the single biggest polluters on the planet" and "the military destroys the large tracts of land it is supposed to protect". Reto Pieth, The Toxic Military, The Nation, 8 June 1992, at 773. More specifically, radioactive contamination from Russian nuclear weapons plants has found its way into the once pristine rivers of Siberia, and may have spread to the Arctic Ocean. Steve Raymer, Ghastly Legacies: Tainted Siberian Rivers Pose Alaska Threat, The Anchorage Daily News, 5 July, 1992, at A1. See generally Douglas Pasternak, Moscow's Dirty Nuclear Secrets, U.S. News & World Report, 10 Feb. 1992, at 46; Stephen Budiansky, Protecting a Nuclear Arsenal From a National Meltdown, U.S. News & World Report, 23 Dec. 1991, at 40.

Some people trace the birth of America's environmental enlightenment to the efforts of President Theodore Roosevelt, Gifford Pinchot, John Muir, and Stephen Mather<sup>18</sup>. But most commentators associate the modern rise of environmentalism as a political issue in this country with the early 1960's<sup>19</sup>. Environmentalism as a political movement in the 1980's can be characterized by its myriad of societal and political opinions<sup>20</sup>.

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<sup>18</sup> E. Joseph Stilwell, R. Claire Canty, Peter W. Kopf, Anthony M. Montrowe, PACKAGING FOR THE ENVIRONMENT: A PARTNERSHIP FOR PROGRESS, 7 (1991); Henry P. Caulfield, The Conservation & Environmental Movements: An Historical Analysis, in ENVIRONMENTAL POLITICS & POLICY: THEORIES & EVIDENCE, 17 (James P. Lester ed., 1989); Jack Lewis, John Muir: Environmental Pioneer, 12 EPA J. 40 (Nov. 1985); Not Man Apart (1976), reprinted in George Cameron Coggins, Charles F. Wilkinson, John D. Leshy, FEDERAL PUBLIC LAND AND RESOURCE LAW, 117 (3rd Ed. 1993); Martin V. Melosi, Hazardous Waste and Environmental Liability: An Historical Perspective, 25 Hous. L. Rev. 741, 750 & 769 (1988). At least one commentator has traced the philosophic underpinnings for protective environmental policies to St. Thomas Aquinas. Patrick Halligan, The Environmental Policy of St. Thomas Aquinas, 19 Env'tl. L. 767 (1989).

<sup>19</sup> Frank P. Grad, TREATISE ON ENVIRONMENTAL LAW, (June 1991); William D. Ruckelhaus, Environmental Protection: A Brief History of Environmental Movement in America & the Implications Abroad, 15 Env'tl. L. 455 (1985); Gordon Harrison, EARTHKEEPING: THE WAR WITH NATURE & A PROPOSAL FOR PEACE, 22-24 (1971); Cecile Trop & Leslie L. Roos, Jr., Public Opinion & the Environment, in THE POLITICS OF ECOSUICIDE, 52 (Leslie L. Roos, Jr. ed., 1971); J. Clarence Davies III, THE POLITICS OF POLLUTION, 78 (1970).

<sup>20</sup> John S. Dryzek, James P. Lester, An Alternate View of the Environmental Problematic, in ENVIRONMENTAL POLITICS & POLICY : THEORIES & EVIDENCE, 316-330 (James P. Lester ed., 1989); Bruce Yandle, THE POLITICAL LIMITS OF ENVIRONMENTAL REGULATION, 2 (1989); Grant McConnell, The Environmental Movement: Ambiguities & Meanings, in ENVIRONMENTAL POLICY: CONCEPTS & INTERNATIONAL IMPLICATIONS, 27 (Albert E. Utton, Daniel H. Henning, eds., 1973). Some commentators have noted

It was only in the last few decades that the American people as a whole began to acknowledge the contribution to the problem of the combined effects of rising population, resource inefficient technology and energy consumption spurred on by affluence<sup>21</sup>. Former Secretary of the Interior Stewart L. Udall stated that Rachel Carson's work Silent Spring, published in 1962, achieved a reorientation of our awareness of earth's laws, altered our perception of our relationship to the living world, and began an education process by which ecological precepts entered the common vocabulary<sup>22</sup>. More recently, U.S. Vice President Al Gore, then the U.S. Senator

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that over the past two decades there has been a rise in extremist factions of confrontational groups that, like modern day Luddites, advocate anti-technology, anti-capitalist agenda. Dixy Lee Ray, TRASHING THE PLANET, 163 (1990); Caulfield, supra note 18, at 55. Some of these groups openly advocate civil disobedience, even anarchy, Rik Scarce, ECO-WARRIORS: UNDERSTANDING THE RADICAL ENVIRONMENTAL MOVEMENT, 5, 55, & 87 (1990). Others are less direct, forsaking political action for invoking the wrath of the environmental deities. See generally Donella H. Meadows, Dennis L. Meadows, & Jorgen Randers, BEYOND THE LIMITS (1992); James E. Lovelock, Geophysiology-The Science of Gaia, in SCIENTISTS ON GAIA, 4 (Stephen H. Schneider, Penelope J. Boston eds., 1991); Ella A. Kwisnek, Earth or Consequences? Mythologizing the Earth Entity as a Way to Environmental Awareness, 29 Duq. L. Rev. 733 (1991); Isaac Asimov & Frederik Pohl, OUR ANGRY PLANET, 14 (1991); Jonathon Weiner, THE NEXT ONE HUNDRED YEARS: SHAPING THE FATE OF OUR LIVING PLANET, 197 (1990).

<sup>21</sup> Richard B. Stewart & James E. Krier, ENVIRONMENTAL LAW & POLICY, 37 (2 Ed. 1978); Emily T. Smith, Growth vs. Environment, Business Week, 11 May 1992, at 66-75.

<sup>22</sup> Stewart L. Udall, Toxic Wastes: Reflections on the Evolution of Environmental Law, 25 Hous. L. Rev. 729, 734 (1988). See also Robert F. Blomquist, Clean New World: Toward an Intellectual History of American Environmental Law 1961-1990, 25 Val. Univ. L. Rev. 1 (1990).

from Tennessee, warned that we must dedicate ourselves to preserving, replenishing, and protecting our environment<sup>23</sup>.

The recognition of the specific dangers of hazardous waste<sup>24</sup> has been slow to develop in the United States. The Federal Government's early efforts towards the regulation of hazardous waste have been characterized as indirect and tentative<sup>25</sup>. This was due in large part to the failure to distinguish the threats of hazardous waste from ordinary garbage<sup>26</sup>. Now it is recognized that past disposal practices for hazardous waste have resulted in present risks to health and environment<sup>27</sup>. It has been estimated that 90% of all hazardous wastes in this country are disposed of in environmentally unsafe ways<sup>28</sup>. An important danger of hazardous waste is its longevity. Toxicity can be assumed to

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<sup>23</sup> Al Gore, The Environmental Challenge: What We Must Do To Survive, 14 Vt. L. Rev. 550 (1990).

<sup>24</sup> Unless otherwise referenced to a specific statutory provision, "hazardous waste" is used throughout this paper in the generic sense and does not infer the use of the term as defined in Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. § 6903(5) (1980).

<sup>25</sup> Wendy Stockton, Putting It Down: Hazardous Waste Management in a Throwaway Culture, 2 U.C.L.A. J. of Env'tl. L. 115, 121 (1981).

<sup>26</sup> Id.

<sup>27</sup> Roger C. Dauer, Hazardous Waste, in PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION, 153 (Paul R. Portney ed., 1990).

<sup>28</sup> Raymond A. Rea, Hazardous Waste Pollution: The Need For a Different Statutory Approach, 12 Env'tl. L. 443 (1982). See also Louise Lief, Dirty Jobs, Sweet Profits, U.S. News & World Report, 21 Nov. 1988, at 54-56.

last 50 years for most organic residues (with a range of 0 to 100 years); 200 years for certain persistent organic chemicals (with a range of 100 to 5000 years); and 500 years for metal elements (with a range of 500 to 10,000 years)<sup>29</sup>. The health threat and the longevity of the toxicity suggest that the wastes we thought were disposed of still pose a threat to the public and the problem must be resolved.

As the American public became increasingly aware of the pervasive pollution problems in our country the contribution of the U.S. military to the situation did not go unnoticed. One critic reported that the U.S. military generates more than five times the toxic waste produced by all five major U.S. chemical corporations combined<sup>30</sup>. It is reported that the U.S. Air Force alone produces 21,000 tons of hazardous waste each year<sup>31</sup>. Environmental groups report that the U.S. military is responsible for two thirds of the U.S.'s production of chloroflorinated carbons chemicals<sup>32</sup>. Past

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<sup>29</sup> Sidney M. Wolf, Hazardous Waste Trials & Tribulations, 13 Env'tl. L. 367, 410 (1983).

<sup>30</sup> Pieth, supra note 17, at 773. However, other commentators note that the single biggest producer of hazardous waste has been industry as a whole, followed by the Federal government, agriculture, research labs, utilities, and mines, Wolf, supra note 29, at 408.

<sup>31</sup> David P. Masko, Air Force Leads World in Environmental Protection, Air Force News Service, reprinted in Sourdough Sentinel, 24 April 1992, at 8.

<sup>32</sup> Pentagon Blamed for Ozone Depletion, The Anchorage Times, 12 Feb. 1992, at A3.

disposal practices have resulted in current risks to health and the environment<sup>33</sup>. The U.S. military is responsible not only for cleaning up the sites on their operating bases, but also on formerly used sites<sup>34</sup>. Any base marked for closure must have its remediation completed before transfer to local communities<sup>35</sup>. However, concern over the hazardous wastes located on the DOD bases has impeded Congress' efforts to

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<sup>33</sup> Dauer, supra note 27, at 153; James Kitfield, The Environmental Cleanup Quagmire, Military Forum, April 1989, 36, 39.

<sup>34</sup> There are approximately 7000 formerly used defense sites in the United States. Seth Shulman, THE THREAT AT HOME: CONFRONTING THE TOXIC LEGACY OF U.S. MILITARY, 106 (1992). In Alaska alone there are about 550 formerly used national defense sites. Most of these sites were built during the Second World War and expanded thereafter. Cost of cleanup on these sites could exceed \$276 million and take the U.S. Corps of Engineers more than ten years to complete, Daniel R. Sadtler, Cleanup at State's Old Military Sites Fall to COE, The Anchorage Times, 19 May 1991, at A-11.

<sup>35</sup> 42 U.S.C. § 9620(h). See also High Cleanup Costs May Foil Potential Military Base Sales, Aviation Week & Space Technology, 29 March 1993, at 54; Environmental Reporter Special Report - Cleaning Up Federal Facilities: Controversy Over An Environmental Peace Dividend, 23 Env'tl. Rptr. (BNA) 2659 (5 Feb. 1993), available on LEXIS, environmental library, periodical file; Bruce Van Voorst, A Thousand Points of Blight, Time, 9 Nov. 1992, at 69; Task Force Picks Apart Base Closure Issues, 2 Defense Cleanup (11 Oct. 1991), available on LEXIS, environmental library, periodical file; Phillip W. Engle, Base Closings: The Wave of the Present, 31 Cont. Mgmt. 25 (July 1991). To what degree the bases must be cleaned is still being debated. The Defense Environmental Restoration Program Task Force has recommended that the DOD be able to transfer the bases prior to completion of the cleanup. The Task Force later modified the recommendation to allow leasing of parts of the bases before restoration is completed. Both proposals met with opposition. Task Force Outlines Conditions For Transfer of Polluted Bases, 13 Hazardous Waste News (30 Sep. 1991), available on LEXIS, environmental library, periodical file.

close the specified bases and quickly turn the sites over to local communities for residential, commercial, industrial, and recreational purposes<sup>36</sup>.

Critics note that the military's legacy of pollution is not limited to our borders<sup>37</sup>. A recent classified GAO report is reputed to have found that the DOD is not in compliance with environmental laws at U.S. bases in Japan, Korea, the Philippines, Germany, Italy, and England<sup>38</sup>. The environmental problems at the 492 U.S. bases overseas include many of the same types of wastes faced back in the United States -- heavy metals, PCBs, used oil, degreasing solvents, acids, paint sludge, cyanide, pesticides, jet fuels, and asbestos<sup>39</sup>.

As noted by Thomas E. Baca, then Deputy Secretary of Defense for the Environment, the prevailing image in the public's mind is that the DOD is the biggest polluter in the US<sup>40</sup>. The DOD's perception problem is due, in part, to the

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<sup>36</sup> Task Force Picks Apart Base Closure Issues, supra note 35; DERP Staff Suggests Cleanup Changes in Name of Unhappy Task Force, 3 Report on Defense Plant Wastes (27 Sep. 1991), available on LEXIS, environmental library, periodical file; Keith Schneider, Transfer of Military Bases Stumbles on Toxins, The Anchorage Daily News, 30 June 1991, at A3.

<sup>37</sup> Pieth, supra note 17, at 773.

<sup>38</sup> Michael Satchell, The Mess We've Left Behind, U.S. News & World Report, 30 Nov. 1992, at 28.

<sup>39</sup> Id.

<sup>40</sup> Thomas E. Baca, guest lecture at The National Law Center, The George Washington University, 22 Oct. 1992.

fact that the military is viewed as a monolithic entity that generates vast amounts of pollution<sup>41</sup> and is insensitive to the environment<sup>42</sup>. Another reason is the large number of DOD sites<sup>43</sup>. In fact, the majority of the Federal National Priorities List (NPL) sites are under the jurisdiction of the DOD<sup>44</sup>. In addition, certain sites containing uniquely national defense wastes have gained nationwide notoriety. One such notorious site is the Department of Energy's Hanford Nuclear Reservation in Washington, where millions of gallons of toxic chemicals and radionuclides, which are byproducts of

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<sup>41</sup> "[T]he Pentagon produces about half a million tons of hazardous waste per year." Asimov & Pohl, supra note 20, at 144.

<sup>42</sup> "[The] environment has always been both a military target and a casualty of war." Bernard Nietschmann, quoted in Morrison, War on the Environment, 23 Natl. J. 536 (2 Mar. 1991), reprinted in Marc A. Ross, Environmental Warfare & the Persian Gulf: Possible Remedies To Combat International Destruction of the Environment, 10 Dick. J. Intl. L. 515 (Spring 1992).

<sup>43</sup> The DOD & DOE account for 20,000 contaminated sites on nearly 2,000 military bases & Energy Department facilities throughout the U.S. Cleaning Up Federal Facilities: Controversy Over An Environmental Peace Dividend, supra note 35. By way of comparison, the Department of Interior and its component agencies administer 70% of the Federal lands. The National Forest Service administers another 26%. Only 3% of Federal lands are administered by the DOD. Nonetheless, that meager 3% represents almost 23 million acres. Robert C. Davis Jr. & R. Timothy McCrum, Environmental Liability For Federal Lands & Facilities, 6 Nat. Res. & Env't. 31 (Summer 1991).

<sup>44</sup> Stan Millan, Federal Facilities & Environmental Compliance: Towards A Solution, 36 Loy. L. Rev. 319 (1990).



the nuclear weapons production, await remediation efforts<sup>45</sup>. Another notorious site is the Department of Defense's Jefferson Proving Ground in Indiana, where unexploded ordinance of various kinds threaten to turn the Army post into a "national sacrifice zone"<sup>46</sup>. The U.S. Army is also responsible for the disposal, storage, and destruction of the DOD's stockpile of chemical weapons<sup>47</sup>. Many of those munitions are 20 to 40 years old and pose unique disposal and remediation challenges<sup>48</sup>.

Other DOD sites are of a more regional interest and are under close scrutiny by the local population, such as the decommissioned White Alice radar sites at Bristol Bay Alaska<sup>49</sup>, and the more than twenty decommissioned DEW sta-

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<sup>45</sup> Federal Facilities: Radioactive Waste Tanks at Hanford Seriously Deteriorating, DOE Reports, 23 Env'tl. Rptr. (BNA) 2836 (26 Feb. 1993), available on WESTLAW, environmental library, periodical file; Asimov & Pohl, supra note 20, at 145.

<sup>46</sup> Shulman, supra note 34, at 4-8.

<sup>47</sup> OFFICE OF TECHNOLOGICAL ASSESSMENT, Disposal of Chemical Weapons: Alternative Technologies - Background Paper, at 13 (OTA-BP-O 95 June 1992). As a note, OTA reports the U.S. Army has stockpiles of nerve and blistering agents at sites across the country: Umatilla Depot OR, Tooele Army Depot UT, Pueblo Depot CO, Newport Army Ammunition Plant IN, Lexington Blue Grass Army Depot KY, Aberdeen Proving Ground MD, Anniston Army Depot AL, Pine Bluff Arsenal AR. See also Lawrence E. Rouse, The Disposition of the Current Stockpile of Chemical Munitions & Agents, 121 Mil. L. Rev. 17 (1988).

<sup>48</sup> Rouse, supra note 47, at 20.

<sup>49</sup> Daniel R. Saddler, Toxic Waste Emerges in the Promised Land, The Anchorage Times, 19 May 1991, at A-1. White Alice sites formed an extensive communications network for aircraft and warning. The sites, located at more than 45 locations

tions in Alaska containing abandoned buildings, oil drums, & PCBs, which have been awaiting demolition for more than twenty-five years<sup>50</sup>. With more than 8000 individual sites requiring some level of cleanup<sup>51</sup> there are few areas in the country that do not have a reminder of some current or former military use.

Yet, even the most virulent of the military critics acknowledge that the overwhelming majority of the environmental problems are "not the result of some devious, errant base commander dumping toxic wastes illegally after dark. Rather, the bulk of the military's toxic wastes originate from the standard daily operating procedures."<sup>52</sup> Contributing the most to the military's toxic waste problem is the sheer volume of solvents used in its operation<sup>53</sup>.

Much of the DOD's environmental waste is germane to

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throughout Alaska, were constructed in the mid-1950s at a cost of \$140 million. The entire system was deactivated by 1972. John Haile Cloe, *TOP COVER FOR AMERICA: THE AIR FORCE IN ALASKA*, 171 (1984).

<sup>50</sup> Dianne Raab, State Officials Say Military's DEW Line Waste is Hazardous, Illegal, The Anchorage Times, 6 May 1992, at B-3. Construction of the Distant Early Warning system began in 1953. The sites were interconnected with the White Alice system and were scattered throughout Alaska and Canada. These sites were deactivated and replaced in the 1980s by the MARS/SEEK IGLOO project, a system of minimally manned radar sites. Cloe, supra note 49, at 170 & 239.

<sup>51</sup> Grant S. Bowers, Defense Contract For Hazardous Waste Cleanup, 32 Contr. Mgmt. 14 (April 1992).

<sup>52</sup> Shulman, supra note 34, at 24.

<sup>53</sup> Id.

industrial activities. Acids and degreasers used for electroplating equipment to combat rust are used extensively at military bases<sup>54</sup>. Leaks of petroleum products and disposal of solvents for cleaning equipment and machinery are estimated to account for 80% of the DOD's environmental problems<sup>55</sup>. Petroleum products leak into and contaminate soil, landfill, and groundwater, in some cases causing large contamination plumes<sup>56</sup>. Toxic chemical waste stored underground in metal drums poses serious problems to ground water and surface water as the metal containers inevitably rust through<sup>57</sup>. As noted by Robert Wood, Chief of Environmental Planning & Compliance Branch at U.S. Air Force's System Command's Flight Test Center, in the past the military, industry, and homeowners did not realize the consequences of the disposal of hazardous substances<sup>58</sup>. The military used

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<sup>54</sup> Id. at 26.

<sup>55</sup> David Bond, Fernald Contract May Set Patterns For Energy Department's Cleanup Management, Aviation Week & Space Technology, 6 April 1992, at 49.

<sup>56</sup> Dave Nolan, Breaking the Cleanup Barrier, Airman Magazine, April 1992, at 28; Phil Rhode, An Eye On 2000, Airman Magazine, April 1992, at 30; Shulman, supra note 34, at 25.

<sup>57</sup> J.W. Maurits la Riviere, Threat To the World's Water, Scientific American, September 1989, reprinted in READINGS FROM SCIENTIFIC AMERICAN: MANAGING PLANET EARTH, 37, at 41 (1990). As noted by la Rievère, microbes that normally breakdown organic pollutants need oxygen to perform their function. Ground water that is cut off from the atmosphere's oxygen supply lacks the capacity for self-purification. la Rievère, supra.

<sup>58</sup> Nolan, supra note 56, at 27.

the same practices of disposal as industry and the homeowner<sup>59</sup>. Past practices were based on the best information available and industry standards of the time.

In light of the public's perception of the military as the major polluter, the military establishment has been outspoken in its commitment to comply with the environmental laws and remediate its past problems. In 1989, Secretary of Defense Dick Cheney issued a policy letter in which he clearly stated that the DOD was to be the Federal leader in agency environmental compliance and protection. He stated that environmental compliance must be a command priority at all levels<sup>60</sup>. The Secretary later remarked that the defense of the nation and the preservation of the environment is not an either/or proposition. To choose between them is impossible in the real world of serious defense threats and genuine environmental concerns. The real choice, he said, is whether the U.S. is going to build a new environmental ethic into the daily business of defense, whether the DOD will make good environmental actions as part of the DOD working concerns, from planning to acquisitions<sup>61</sup>.

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<sup>59</sup> Id.

<sup>60</sup> Dick Cheney, Secretary of Defense, MEMORANDUM FOR SECRETARIES OF MILITARY DEPARTMENTS RE: ENVIRONMENTAL MANAGEMENT, Policy Letter, 10 October 1989.

<sup>61</sup> Dick Cheney, Secretary of Defense, remarks made at the Defense & Environmental Initiative Forum, Washington D.C., 6 & 7 Sep. 1990, reprinted in Shulman, supra note 34, at 115.

The individual Military Departments echoed the commitment to comply with environmental standards and to cleanup existing contaminated DOD sites. The Secretary of the Army and the U.S. Army Chief of Staff endorsed Secretary Cheney's commitment to meet or exceed environmental standards and noted that the Army would continue its efforts to clean up sites that had been contaminated through past disposal practices<sup>62</sup>. The Secretary of the Navy also endorsed Secretary Cheney's policy letter<sup>63</sup>. The U.S. Air Force Chief of Staff challenged his personnel to lead the DOD in environmental protection and compliance. Among the ambitious goals he set for his service included restoration of at least ten percent of the service's hazardous waste sites annually, with all sites completed by the year 2000<sup>64</sup>.

This new acknowledgment of the environmental tasks facing the military agencies is due, at least in part, to changes in geopolitics. The end of the Cold War, as epitomized by the unification of Germany, the balkanization of Yugoslavia and the dissolution of the former Soviet Union, has forced the DOD to reassess its priorities, missions, budget, and role in a

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<sup>62</sup> Carl E. Vuono, U.S. Army Chief of Staff, & M.P.W. Stone, Secretary of the Army, ENVIRONMENTAL MANAGEMENT POLICY LETTER, 17 July 1990.

<sup>63</sup> H. Lawrence Garrett III, Secretary of the Navy, MEMORANDUM FOR THE CHIEF OF NAVAL OPERATIONS & COMMANDANT OF THE U.S. MARINE CORPS, 24 Nov. 1989.

<sup>64</sup> Gen Merrill A. McPeak, U.S. Air Force Chief of Staff, LETTER TO THE U.S.A.F. MAJOR COMMANDS, 17 April 1991.

world without a Soviet threat<sup>65</sup>. Counsel for the Commandant of USMC has stated, "[a] habitable environment is essential not only to train, but to survive. Contamination of our land, water, or air could literally bring our demise; therefore, we clean up our environment as a matter of survival"<sup>66</sup>. The Commander for the U.S. Corps of Engineers has acknowledged, "We recognize that sustaining the environment is a necessary part of building and securing this Nation."<sup>67</sup> Sam Nunn, U.S. Senator from Georgia, has commented that we face "a new and different threat to [the] U.S. national security - the

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<sup>65</sup> See generally Federal Facilities: Cleaning Up Closing Bases Will Cost More, Take Longer Than Expected, CBPO Expects, 23 Env'tl. Rptr. (BNA) 1385 (11 Sep. 1992); SENATE COMM. ON ARMED SERVICES, REPORT ON S. 3114 - NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 1993, reprinted at Govt. Cont. Rpts. (CCH) ¶ 99,571 (9 Sep. 1992); OFFICE OF TECHNOLOGY ASSESSMENT, American Military Power: Future Needs, Future Choices-Back-ground Paper, at 14 & 15 (OTA-BP-ISC-80 October 1991); OFFICE OF THE TECHNOLOGY ASSESSMENT, Redesigning Defense: Planning the Transition to the Future U.S. Industrial Base, at 6 & 7 (OTA-ISC-500 July 1991); HOUSE COMMITTEE ON ARMED SERVICES, H.A.S.C. No. 102-54, The Structure of the U.S. Defense Industrial Base Panel, July 12, 1991- Mar 18, 1992; HOUSE COMMITTEE ON ARMED SERVICES, The Fading Threat: Soviet Conventional Military Power in Decline, (Comm. Print 11) 9 July 1990; Robin Knight & Bruce B. Auster, Alliance Without An Enemy, U.S. News & World Report, 11 Nov. 1991, at 50.

<sup>66</sup> Peter M. Murphy, The Importance of Environmental Law Considerations for the Military Commander & Advisor, 38 Nav. L. Rev. 1 (1989).

<sup>67</sup> Lt Gen H.J. Hatch, MEMORANDUM FROM THE COMMANDER OF THE U.S. ARMY CORPS OF ENGINEERS: STRATEGIC DIRECTION FOR ENVIRONMENTAL ENGINEERING, 14 Feb. 1990, quoted in 1990 The Army Lawyer 3, at 7 (DA PAM 27-50-209 May 1990).

destruction of our environment."<sup>68</sup> Senate Majority Leader George J. Mitchell has characterized the environmental problems as political and military threats to national sovereignty<sup>69</sup>. This new environmental enlightenment is not strictly an American phenomenon<sup>70</sup>.

At a time of shrinking defense budgets, environmental cleanup is the fastest growing category of military expenditures<sup>71</sup>. The task of cleaning up the military sites

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<sup>68</sup> Patricia Gilmartin, Nunn Leads Democratic Effort to Shift Defense Resources to Environmental Research, Aviation Week & Space Technology, 9 July 1990, at 22.

<sup>69</sup> George J. Mitchell, WORLD ON FIRE: SAVING AN ENDANGERED EARTH, 132 (1991).

<sup>70</sup> Mikhail Gorbachev was reported to have acknowledged "that in the Soviet Union we only recently came to understand the vital importance of the ecological problems to a proper extent at the policy level. Perestroika has also altered our views on ecology." Mitchell, supra note 69, at 133. Gorbachev also said, "International economic security is inconceivable unless related not only to disarmament, but also the elimination of the threat to the world's environment." Dick Thompson, The Greening of the U.S.S.R., Time, 2 Jan 1989, at 68. "The policy of glasnost is allowing us to learn more & more about environmental disasters in U.S.S.R. [The Supreme Soviet is] committed to making perestroika permanent in the environmental sphere." Alexei Yablokev, then Vice Chairman of U.S.S.R. Soviet Committee on Environmental Protection & Rational Use of Natural Resources, A Perspective From Another Country: The Soviet Task, 16 EPA J. 50 (JAN/FEB 1990).

<sup>71</sup> Cleaning Up Federal Facility: Controversy Over An Environmental Peace Dividend, supra note 35; Van Voorst, supra note 35, at 69. Industry views hazardous waste transport & disposal industries as a growth market, with the best opportunities in DOD & DOE projects. The potential DOD/DOE market could be as high as \$300 billion over the next several decades, compared with \$9 billion budgeted for FY 1993. Hazwaste (sic) Firms Will Rebound, Standard & Poor's Predict, Toxic Materials News, 6 Jan. 1993, available in LEXIS, environmental library, periodical file. See also DOE, DOD Remediation Creates Huge Market For Instruments, Nuclear Waste News, 15

is so overwhelming that accurate cost projections are impossible to make. Some estimates are as low as \$25 billion<sup>72</sup>. Other estimates for military facilities exceed \$100 billion<sup>73</sup>. The cost of cleanup could exceed \$6 billion for the U.S. Air Force sites alone<sup>74</sup>. By way of comparison, the cost of cleanup of all remaining Superfund sites is placed at \$300 billion<sup>75</sup>. Few doubt that the costs of the military cleanup will more than offset the billions of dollars in savings over the next twenty years the Federal government had projected to gain from the base closures<sup>76</sup>.

The cost estimates on military cleanup are influenced by

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Oct. 1992, available in LEXIS, environmental library, periodical file.

<sup>72</sup> Industry Urges DOD Action on Cleanup Indemnification, 34 Govt. Contr. ¶ 142 (8 Mar 1992); Bond, supra note 55, at 48.

<sup>73</sup> Seymour, supra note 3, at 499; Asimov & Pohl, supra note 20, at 145.

<sup>74</sup> Vickie M. Grahm, Interview: Gary D. Vest, Deputy Assistant Secretary of the Air Force for the Environment, Airman Magazine, April 1992, at 19; Neff Hudson, Air Force's Top Environmentalist Calls For Easing Base Closure Laws, Air Force Times, 10 Feb. 1992.

<sup>75</sup> Stanley N. Davis, Our Precious ground Water, 1992 YEARBOOK: WORLD BOOK ENCYCLOPEDIA, 456, 464 (1992); Bradford C. Mank, Two Headed Dragon of Siting & Cleaning Up Hazardous Waste Dumps, 19 Bos. Col. Env'tl. L. Rev. 239, 242 (1991-1992).

<sup>76</sup> Schneider, supra note 36, at A-3. Contrast with Federal Facilities: Savings From Shutting Down Bases Exceed Costs of Cleanups, Officials Say, 23 Env'tl. Rptr. (26 Mar. 1993), available on WESTLAW, environmental library, periodical file. See generally Geoffrey Hughes, Cost Considerations For Clean Closure: A Case Study, 2 Fed. Facil. Env'tl. J. 161 (Summer 1991).



whether overseas bases and the Department of Energy's nuclear munitions plants are included in the figure<sup>77</sup>. There are approximately 3000 toxic sites at DOE's nuclear weapons plants, including the infamous Rocky Mountain Arsenal CO, the Hanford WA weapons plant<sup>78</sup>, the DOE weapon factories at Fernald OH, Oak Ridge TN, the Lawrence Livermore National Lab CA, and Idaho National Energy Laboratory<sup>79</sup>. For every pound of plutonium, the Hanford plant also produced approximately 170 gallons of high level radioactive waste and 27,500 gallons of less dangerous, but still radioactive, low-level wastes<sup>80</sup>. Cleanup of the radioactive and chemical waste at the nation's nuclear weapons plants and military installations looms as the biggest, toughest, and most expensive task of ecological restoration in American history<sup>81</sup>. Some have said that the technical challenges of the cleanup effort equal those of the

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<sup>77</sup> Van Voorst, supra note 35, at 69.

<sup>78</sup> Uncle Sam's Toxic Folly, U.S. News & World Report, 27 March 1989, at 20.

<sup>79</sup> Douglas Pasternak & Peter Carey, A \$200 Billion Scandal, U.S. News & World Report, 14 Dec. 1992, at 35 & 40. See generally OFFICE OF TECHNOLOGY ASSESSMENT, Complex Cleanup: The Environmental Legacy of Nuclear Weapons Production, at 149-154 (OTA-O-484 Feb. 1992).

<sup>80</sup> Karen Dorn Steele, Cleaning Up After the Cold War, in 1993 WORLD RESOURCES INSTITUTE - ENVIRONMENTAL ALMANAC, 131 (Allen Hammond ed., 1992).

<sup>81</sup> Uncle Sam's Toxic Folly, supra note 78, at 20. See also GENERAL ACCOUNTING OFFICE, Cleanup Technology: Better Management for DOE's Technology Development program, (GAO/RCED-92-145, 10 Apr. 1992); GENERAL ACCOUNTING OFFICE, Cleanup Technology: DOE's Management of Environmental Cleanup Technology, (GAO/T-RCED-92-29, 26 Feb. 1992).

Apollo moon landing and space shuttle programs, and will cost roughly as much<sup>82</sup>. While DOE retains the responsibility for the nuclear weapon plants, the legacy of those plants is likely to reflect on DOD.

No one has a firm idea of how much it will eventually cost to clean up the environmental challenges at U.S. military bases located overseas. Estimates include \$100 million for the 39 U.S. Air Force bases in eleven nations<sup>83</sup>. The cost of remediating 21 old remote radar sites in Canada may exceed \$61 million<sup>84</sup>. Cost of cleanup efforts for U.S. Army sites in Germany may exceed \$200 million, with the total cost of the cleanup efforts in the former West German republic exceeding \$3 billion<sup>85</sup>. To what extent DOD remains responsible for those overseas efforts, as the United States continues its drawdown, is an issue left unresolved.

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<sup>82</sup> Uncle Sam's Toxic Folly, supra note 78, at 20.

<sup>83</sup> Satchell, supra note 38, at 30.

<sup>84</sup> Id.

<sup>85</sup> Id.

## PART II

### THE CONGRESSIONAL RESPONSE

#### A. OVERVIEW OF CERCLA, SARA, DERP

##### 1. CERCLA OF 1980

The DOD's involvement in hazardous waste cleanup predates the passage of the Federal environmental acts in the 1980s<sup>86</sup>. In 1975 the U.S. Army created an Installation Restoration (IR) Program to investigate and respond to past hazardous waste disposal sites at DOD installations<sup>87</sup>. The program was expanded DOD-wide the next year<sup>88</sup>. DOD's initial goals were to identify, evaluate, and contain migration of contamination leaving DOD installations<sup>89</sup>. Actual restoration of the DOD

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<sup>86</sup> In 1973 the President directed the heads of the executive agencies to prevent, control, and abate environmental pollution at Federal facilities. Exec. Order No. 12088 (1973), 3 C.F.R. § 2243 (1979), amended by Exec. Order No. 12580 (1987).

<sup>87</sup> Kyle E. McSllarrow, The Department of Defense Environmental Cleanup Program: Application of State Standards After SARA, 17 Env'tl. L. Rptr. 10120 (Apr. 1987); Barry N. Breen, Superfund: The Army As Protector of the Environment. THE ARMY LAWYER, at 1 (DA PAM 27-50-113 MAY 1982).

<sup>88</sup> McSllarrow, supra note 87, at 10120. See generally Joseph A. Wellington, A Primer on Environmental Law for Naval Services, 38 Nav. L. R. 5 (1989).

<sup>89</sup> Id.

land was considered only when sale or other transfer was contemplated<sup>90</sup>. Implementation of this program required DOD components to identify their abandoned hazardous waste disposal sites and establish a prioritized program for conducting record searches at their installations<sup>91</sup>. While the program applied to the DOD, a nationwide policy on all hazardous waste was still needed.

In 1980, the Comprehensive Environmental, Response Compensation, and Liability Act (hereinafter CERCLA)<sup>92</sup> was enacted to address what many believed was a limited problem. The Environmental Protection Act was instructed to find 400 hazardous waste sites for cleanup. At the time, cleanup of a site was considered to be relatively inexpensive and involved not much more than removing containers of waste or scraping a few inches of contaminated dirt. The EPA was given \$1.6 billion to spend over five years.<sup>93</sup>.

CERCLA provided funding and enforcement authority for

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<sup>90</sup> Id.

<sup>91</sup> DEQPPM 80-6 (24 June 1980), as superseded by DEQPPM 81-5 (11 Dec. 1981).

<sup>92</sup> CERCLA §§ 101, et seq., 42 U.S.C. §§ 9601 et seq., Pub. L. 96-150, as amended by Pub. L. 99-499 (1986).

<sup>93</sup> H. R. No. 99-253(I), 99th Congress, reprinted in 1986 U.S.C.C.A.N. 2836. For a good review of the legislative history of the original Act see United States v. CHEM-DYNE Corp., 572 F. Supp. 802, 805 (1983). See also Alfred R. Light, CERCLA Law & Procedure, 12-34 (1991); D. Dennis Waldrop, Waste Not, Want Not: "Arranging for Disposal" Under CERCLA § 107(a)(3), J. Envtl. L. & Litig. 143 (1989); Frank Grad, A Legislative History of CERCLA (Superfund) Act of 1980, 8 Colum. J. Envtl. L. 1 (1982).

cleaning up existing hazardous waste sites in the U.S. and for responding to hazardous substance spills. CERCLA joined the Resource Conservation & Recovery Act (RCRA)<sup>94</sup> to provide "wrap around" coverage for hazardous waste. While RCRA provides a cradle-to-grave regulatory program for present hazardous waste activities, CERCLA is designed to provide a comprehensive program for past hazardous activities<sup>95</sup>.

Whenever there is a "release", or substantial threat of a release<sup>96</sup>, into the environment of any hazardous substance, pollutant or contaminant under circumstances where the pollutant does or may present an imminent and substantial

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<sup>94</sup> Solid Waste Disposal Act, Pub. L. No. 94-580, as amended by Resource Conservation & Recovery Act, codified at 42 U.S.C. § 6901 et seq. RCRA's authority covers "hazardous wastes" which is a narrower category than "hazardous substances". SWDA § 1004(5), 42 U.S.C. § 6903(5). "Hazardous substances" under CERCLA may also be "hazardous waste" under RCRA.

<sup>95</sup> Richard G. Stoll, Comprehensive Environmental Response, Compensation, & Liability Act, in GOVERNMENT INSTITUTE'S ENVIRONMENTAL LAW HANDBOOK, 471 (1991). Cleanup of active sites are termed "corrective actions" under RCRA, whereas CERCLA "remedial actions" are on generally inactive sites. There may be situations where both RCRA and CERCLA apply to different segments of the same site. For two good comparisons of CERCLA & RCRA see Sylvia K. Lowrance, Corrective Action: Task With a Big Future, 17 EPA J. 47, 48 (July/Aug. 1991) & Richard G. Stoll, RCRA vs. CERCLA -- Choice of Overlap, 778 ALI-ABA 141 (29 Oct. 1992), available on WESTLAW, environmental library, text-periodical file. See generally GENERAL ACCOUNTING OFFICE, Hazardous Waste: Much Work Remains To Accelerate Facility Cleanups, (GAO/RCED-93-15, 19 Jan. 1993).

<sup>96</sup> A "release" includes any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of any hazardous substance, pollutant, or other contaminant into the environment. CERCLA § 101(22), 42 U.S.C. § 9601(22)(1980).

danger, the EPA is authorized to undertake "removal"<sup>97</sup> and/or "remedial"<sup>98</sup> action<sup>99</sup>. CERCLA was enacted to make those parties responsible for the release of any hazardous substance liable for the cleanup or containment of the release. The Act imposes joint and strict liability upon generators and transporters of hazardous waste, and operators of hazardous waste treatment and disposal (HWT&D) facilities<sup>100</sup>.

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<sup>97</sup> "Removal" means the cleanup of released hazardous substances from the environment, including such actions as is necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances. The term may include security fencing, temporary evacuation, & supplying provisions. CERCLA § 101(23); 42 U.S.C. § 9601(23) (1980).

<sup>98</sup> "Remedial action" means those actions consistent with a permanent remedy taken instead of or in addition to removal actions in the event of a release. It is a broad term that encompasses a variety of methods. CERCLA § 101 (24), 42 U.S.C. § 9601(24) (1980). Offsite transport, storage, treatment, and destruction of the hazardous substances being the most obvious. Removal is a short term, limited response to a *more manageable* problem, while a remedial action is a longer term, more permanent & expensive solution for a more complex problem. Yet, the distinction between the two may be a fine line. See also Raul A. Deju & Dean A. Calland, Cleanup of Inactive Hazardous Waste, 1 Nat. Res. & Env't. 10 (Fall 1985).

<sup>99</sup> CERCLA § 104(a)(1); 42 U.S.C. § 9604(a)(1) (1980), as amended by Pub. L. 99-499 (1986).

<sup>100</sup> CERCLA § 107, 42 U.S.C. § 9607 (1980), as amended by Pub. L. 99-499 (1986). See generally Stephan M. Feldman, CERCLA Liability, Where It Is & Where It Should Not Be Going: The Possibility of Liability Release For Environmentally Beneficial Land Transfers, 23 Env'tl. L. 295, 306 (1993); John Henry Davidson & Orlando E. Delogu, FEDERAL ENVIRONMENTAL REGULATION, 6-12 (1992); Phillip T. Cummings, Completing the Circle: Comprehensive Environmental Response, Compensation and Liability, The Last of the Major Environmental Laws, Uses The Bottom Line To Corral Pollution, Env'tl. F. 11 (Nov.- Dec. 1990); Diana L. McDavid, Liabilities of the Innocent Current Owner of Toxic Property Under CERCLA, 23 U. Rich. L. R. 403 (1989); Andres L. Bull, Superfund & Hazardous Waste Site Next

Under the provisions of the original CERCLA, two sections were directly applicable to Federal facilities. The first stated that each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government shall be subject to, and comply with, the Act in the same manner and to the same extent as any nongovernmental entity, including liability under this Act. In other words, the U.S. Government is liable for cleanup costs to the same degree as a private party for its actions as a generator, transporter, or operator of a HWT&D facility which precipitates a CERCLA response or remedial action<sup>101</sup>. The authority to respond to releases, or threats of releases, of hazardous substances on DOD sites was delegated to the Secretary of Defense, and redelegated to the individual secretaries of the military departments<sup>102</sup>. DOD designated its Installation Restoration programs as the means to meet its CERCLA

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Door: Can Citizens Clean It Up?, 6 P.A.C.E. Env'tl. L. R. 643 (1988-1989); Donald Brown, Superfund Cleanups, Ethics & Environmental Risk Assessment, 16 Bos. Coll. Env'tl. Aff. L. R. 181 (1988).

<sup>101</sup> CERCLA §§ 107(g) & 120, 42 U.S.C. §§ 9607(g) & 9620, as amended by Pub. L. 99-499 (1986). See generally Sherly L. Katz, Hazardous Waste on Public Lands, 2 Nat. Res. & Env't. 14 (Spring 1986); Davis & McCrum, supra note 43, at 32. For an excellent review of the caselaw under § 107 see Kyle E. McSlarrow, David E. Jones, Eric J. Murdock, A Decade of Superfund Litigation: CERCLA Case Law From 1981-1991, 21 Env'tl. L. Rptr. 10367, 10388 (July 1991).

<sup>102</sup> Exec. Order No. 12316 § 2(c) (1981), 3 C.F.R. Part 168 (1982); MEMORANDUM FOR ASSISTANT SECRETARIES OF MILITARY DEPARTMENTS: DELEGATION OF AUTHORITY, Nov. 2, 1981.

obligations<sup>103</sup>.

The second provision of CERCLA aimed at Federal facilities stated that no money in the Superfund would be available for the remedial action, other than certain actions specified in the Act with respect to federally owned facilities<sup>104</sup>. That is, while Federal agencies must comply with CERCLA, they do not participate in the fund. In 1984 a separate fund was created for installation restoration projects on DOD sites<sup>105</sup>.

By 1980 the U.S. Navy and Air Force had implemented their own versions of the Installation Restoration program<sup>106</sup>. Each military department ran its own programs, with the Office of Secretary of Defense providing oversight and coordination<sup>107</sup>.

## 2. SARA OF 1986

Five years after the enactment of CERCLA the country slowly began to realize the true size of the problem. Unsatisfied with the speed of progress on the cleanups,

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<sup>103</sup> DEQPPM 81-5 (11 Dec. 1981).

<sup>104</sup> CERCLA § 111(e)(3), 42 U.S.C. § 9611(e)(3), as amended by Pub. L. 99-499 (1986).

<sup>105</sup> Pub. L. No. 98-212, 97 Stat. 1421 (1983)

<sup>106</sup> McSllarrow, supra note 87, at 10120.

<sup>107</sup> McSllarrow, supra note 87, at 10121.



Congress realized that the CERCLA as originally enacted was inadequate for the challenge<sup>108</sup>. With the passage of the Superfund Amendments and Reauthorization Act of 1986 (SARA)<sup>109</sup> Congress undertook many alterations to CERCLA. Some of the most significant changes clarified and expanded the duties and responsibilities of DOD under CERCLA. First, SARA clarified that Federal activities are subject to provisions of CERCLA to the same extent as non-governmental entities.<sup>110</sup> The 1986 amendments also clarified that state laws concerning removal and remediation action, including enforcement, apply to activities at facilities owned or operated by a department, agency, or other instrumentality of the U.S.<sup>111</sup> SARA also created the Hazardous Waste Compliance Docket which was designed to be a central repository of information available to the public regarding hazardous substances on Federal sites<sup>112</sup>. The new amendments also required that a preliminary assessment of all Federal facilities be accomplished to determine their environmental status and to determine which sites should be added to the

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<sup>108</sup> H. R. No. 99-253(I), reprinted at 99th Congress, 1986 U.S.C.C.A.N. 2837.

<sup>109</sup> Pub. L. 99-499, 100 Stat. 1613 (1986), codified at Chapter 10 and 42 U.S.C. § 9601 et seq. (1986).

<sup>110</sup> SARA § 120(a)(1) & (2), 42 U.S.C. § 9620(a)(1) & (2) (1986).

<sup>111</sup> SARA § 120, 42 U.S.C. § 9620(a)(4) (1986).

<sup>112</sup> SARA § 120, 42 U.S.C. §§ 9620(c), 9625, 9630 (1986)

National Priorities List<sup>113</sup>.

SARA also added Chapter 160 to Title 10 in the United States Code, thereby establishing the Defense Environmental Restoration Program (hereinafter DERP)<sup>114</sup>. DERP is the authority for the Secretary of Defense to carry out environmental restoration at military facilities<sup>115</sup>. The goals of the program include identification, investigation, research and development, and cleanup of contamination f. hazardous substances, pollutants and contaminants<sup>116</sup>; reduction of other environmental damage, such as detonation and disposal of unexploded ordnance, which creates an imminent and substantial endangerment to the public health, or welfare of the environment<sup>117</sup>; and the demolition and removal of unsafe buildings and structures, including those structures of the DOD located at sites formerly used by, or under the jurisdiction of, DOD<sup>118</sup>. The Secretary of Defense may enter into agreements with the states or Federal agencies, or local governments to obtain their services to assist in carrying out

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<sup>113</sup> SARA § 120, 42 U.S.C. § 9620(d) (1986).

<sup>114</sup> SARA § 211, 10 U.S.C. § 2701 et seq. The statute refers to the DERP. The military departments sometimes still refer to their programs as IRP. See generally Laurent Hourcle', Environmental Law For The Air Force, 170 (1987).

<sup>115</sup> SARA § 211, 10 U.S.C. § 2701(b) (1986).

<sup>116</sup> SARA § 101, 10 U.S.C. § 2701(b)(1) (1986).

<sup>117</sup> SARA § 101, 10 U.S.C. § 2701(b)(2) (1986).

<sup>118</sup> SARA § 101, 10 U.S.C. § 2701(b)(3) (1986).

the DERP<sup>119</sup>.

The DERP also established a fund dedicated to environmental restoration at currently owned and formerly owned DOD sites<sup>120</sup>. The Secretary of Defense is charged with administering this Defense Environmental Restoration Account (hereinafter DERA)<sup>121</sup>. Each year the President is required to earmark funds for environmental restoration programs<sup>122</sup>.

Each year the Secretary must report to Congress the progress made during the preceding year in implementing the DERP<sup>123</sup>. Unlike most appropriations, DERA funds remain available until transferred for obligation<sup>124</sup>.

#### B. CLEANUP PROGRAMS UNDER CERCLA/SARA

Cleanup projects under CERCLA are prolonged, multi-stage efforts. The general program operates in accordance with the

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<sup>119</sup> SARA § 101, 10 U.S.C. § 2701(d) (1986).

<sup>120</sup> SARA § 211, 10 U.S.C. § 2703(a)(1) (1986). By way of contrast it should be noted that civilian agencies of the U.S. Government do not have specific appropriations for environmental compliance and must rely on general agency appropriations. Rami S. Hanash, Effects of the Anti-Deficiency Act on Federal Facilities' Compliance With Hazardous Waste Laws, 18 Env'tl. L. Rptr. 10541, 10545 (Dec. 1988).

<sup>121</sup> SARA § 211, 10 U.S.C. § 2703(b) (1986).

<sup>122</sup> SARA § 211, 10 U.S.C. § 2703(d) (1986).

<sup>123</sup> SARA § 211, 10 U.S.C. § 2706(a) (1986).

<sup>124</sup> SARA § 211, 10 U.S.C. § 2701(f) (1990).

National Contingency Plan<sup>125</sup>. The initial stage is the Preliminary Assessment & Site Investigation (PA/SI)<sup>126</sup>. During the PA/SI, sites are examined and contamination is identified and assessed. If necessary, the area may be surveyed and samples taken for testing<sup>127</sup>. The PA/SI activities may be accomplished by DOD personnel, or by private contractors. The data collected in the PA/SI process may be used to determine whether the site will be included in the National Priorities List<sup>128</sup>. DOD has reported that it has assessed nearly all of the more than 17,000 military sites at installations in its cleanup inventory. Of these, about a

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<sup>125</sup> The general program operates in accordance with The National Contingency Plan (NCP). 40 C.F.R. Subpart A, § 300.1 (1991), 55 Fed. Reg. 8813 (8 Mar. 1990). Provisions have been made for a special Subpart K to the NCP to deal with Federal facilities, but this has not yet been issued. The number of sites on the list of Federal facilities that will be evaluated for possible inclusion on the Superfund NPL grew to 1,930 with the addition of 263 new facilities, according to the EPA. Hundreds of Federal Facilities Added to Compliance Docket, EPA Says, 23 Env'tl. Rptr. 2678 (12 Feb. 1993), available on WESTLAW, environmental library, periodical file. See generally Theodore G. Brown III, Superfund & The National Contingency Plan: How Dirty is "Dirty"? How Clean Is "Clean"?, 12 Ecol. L. Q. 89 (1984).

<sup>126</sup> SARA § 120, 42 U.S.C. § 9620(d) (1986); 40 C.F.R. § 300.305, 300.420 (b) & (c) (1991). Hourcle', supra note 114, at 172.

<sup>127</sup> 40 C.F.R. § 300.420(b)(2) & (c) (1991); Stoll, supra note 95, at 477.

<sup>128</sup> 40 C.F.R. § 300.420(C)(iii) (1991). In 1992 Federally owned sites accounted for 123 of the 1209 sites on the NPL. Lisa K. Friedman, Caroline H. Welhing, et al., 1992 Annual Report - Solid & Hazardous Waste Committee, National Resources, Energy, & Environmental Law - 1992 Year in Review (ABA), at 207 (1993).

third are closed out with a determination that no further remediation action under CERCLA is needed<sup>129</sup>.

The first step of the remediation phase is the Remedial Investigation/Feasibility Study (RI/FS)<sup>130</sup>. RI/FS is characterized by designs, planning, and investigation. Remedial Investigation refers to the site evaluation and analysis to characterize the conditions at the site, the source of the contamination, the nature and the extent of contamination, as well as the risk presented by the site<sup>131</sup>. The purpose of the Feasibility Study is to develop and evaluate remedial alternatives<sup>132</sup>. These studies entail engineering and construction alternatives, estimates of cost, anticipated effects, engineering feasibility, and environmental impact<sup>133</sup>. Based upon the data in the RI/FS and public comment, a final remedial action plan is selected, with the approval of the EPA.<sup>134</sup> Selection criteria include cost, compliance with "applicable" or "relevant and appropriate"

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<sup>129</sup> Cleaning Up Federal Facilities: Controversy Over an Environmental Peace Dividend, supra note 35.

<sup>130</sup> SARA § 120, 42 U.S.C. § 9620(e)(1) (1986); 40 C.F.R. § 300.430 (1991).

<sup>131</sup> 40 C.F.R. § 300.430(a)(2) & (d) (1991).

<sup>132</sup> 40 C.F.R. § 300.430(a)(2) & (e) (1991); Stoll, supra note 95, at 478.

<sup>133</sup> Id. See also OFFICE OF MANAGEMENT & BUDGET Policy Letter 83-3, June 8, 1983.

<sup>134</sup> SARA § 120, 42 U.S.C. § 9620(e)(2) (1986); 40 C.F.R. § 300.430(f) (1991).

(ARARs) Federal and state environmental statutes, long and short term effectiveness, protection of health and the environment, reduction in toxicity, volume or mobility of hazardous substances, implementability, and state and community acceptance<sup>135</sup>. A Record of Decision (ROD) is prepared to announce the tentative remedy selection from among the RI/FS options<sup>136</sup> and submitted for public review and comments in a process similar to the Environmental Impact Statement<sup>137</sup>.

After this preliminary work is concluded the remedial action may begin. Before remedial action on a site is taken, detailed tailored plans of how the cleanup effort will be accomplished must be prepared. During the design stage, detailed engineering plans are developed, site specifications examined, and all site specific factors are incorporated into a general remedial concept<sup>138</sup>. If the remediation work is not to be done by in-house military units, the agency may award a "construction" contract to a private firm for the actual remediation or cleanup. DOD relies primarily on private contractors to perform the cleanup effort<sup>139</sup>.

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<sup>135</sup> 40 C.F.R. § 300.430(e)(9)(iii) (1991); Stoll, supra note 95, at 485.

<sup>136</sup> Stoll, supra note 95, at 479.

<sup>137</sup> SARA § 117, 42 U.S.C. § 9617(a) & (b) (1986); 40 C.F.R. § 300.430(f)(5) (1991).

<sup>138</sup> Id.

<sup>139</sup> Shulman, supra note 34, at 145.

Some commentators note that characterizing environmental remediation contracts as "construction" is misleading and causes confusion.<sup>140</sup> The term "remedial action", as defined in the Act, refers to tasks that include both construction efforts and services, without using either term<sup>141</sup>. The distinction between a construction contract and a services contract is important and can have far reaching implications affecting the quality of the source selection competition, and possibly the contract administration. Certain specified clauses must be included in "construction" solicitations and the resultant contracts. Some of these clauses require the bidder/offeror to post bonds of substantial value<sup>142</sup>. In addition, some clauses required in construction contracts have

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<sup>140</sup> Some critics note that remediation work is more like services than construction. Attempts to use FAR construction clauses indicate the standardized construction clauses do not fit the unique and atypical circumstances that arise in the field. Michael A. Skawin, Contracting For Environmental Remediation, 32 Cont. Mgmt. 25, 62 (Apr. 1992).

<sup>141</sup> SARA § 101(24), 42 U.S.C. § 9601(24) (1986).

<sup>142</sup> The Miller Act, 40 U.S.C. § 270a et seq. (1984), requires performance bonds and payment bonds be posted by bidders/offerors for any construction contract expected to exceed \$ 25,000. FAR 28.102-1. Performance bonds may be as much as 100% of the original contract price. FAR 28.101-2(a). Payment bonds will vary in amount with the value of the contract: 50% of the contract price must be posted, if the contract price is \$1 million or less; 40% , if the contract price is between \$1 million and \$5 million; a maximum of \$2.5 million must be posted, if the contract price is greater than \$5 million. FAR 28.102-2. If payment bonds or performance bonds are required, the bidder/offeror must also post a bid guarantee. FAR 28.101-1 [FAC 84-12, FAC 84-26, FAC 84-5]. All of these requirements can place a burden on firms wishing to compete.

no relevance to services<sup>143</sup>. Construction contracts require compliance with specified wage standards<sup>144</sup>. All those clauses place an administrative or financial burden upon the competing contractor. By comparison, the requirements on a contractor wishing to compete on a "services" contract are relatively light<sup>145</sup>. If the construction clauses are required by the CO but are, in fact, unnecessary or inappropriate, competition may suffer by discouraging otherwise qualified contractors from competing.

To complicate matters further, some remedial types of tasks, such as dismantling of buildings and removal of debris, are treated as a services contract<sup>146</sup>. Yet, that same work requires "construction" type bonds under the Miller Act<sup>147</sup>, but not the Davis Bacon Act.<sup>148</sup> In other cases, the remedial

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<sup>143</sup> Construction contracts require a litany of specialized clauses. The list is included in the FAR Subpart series 36.5 & 52.236. To name only a few: Differing Site Conditions, FAR 36.502, FAR 52.236-2; Site Investigation & Conditions Affecting Work, FAR 36.503, FAR 52.236-3; Physical Data Clause, FAR 36.504, FAR 52.236-4.

<sup>144</sup> Davis Bacon Act, 40 U.S.C. § 276(a) (1964).

<sup>145</sup> The Service Contract Act, 41 U.S.C. § 351 et seq., as amended (1976), only requires the payment of minimum wages to employees for contracts over \$42,500. FAR 37.107. A "service contract" refers to a contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply. FAR 37.101 [FAC 84-40].

<sup>146</sup> FAR 37.700 [FAC 84-40].

<sup>147</sup> FAR 28.102-1; FAR 37.302.

<sup>148</sup> 40 U.S.C. § 276a-276a-7; FAR 37.301.



effort being solicited may require construction tasks and services. The CO must be careful to properly characterize the nature of the contract being solicited, or run the risk of burdening the solicitation and contract with unnecessary requirements that must be borne by competitors.

### C. SOURCE SELECTION OF REMEDIATION ACTION CONTRACTORS

At least one critic of the military's remediation efforts has said the military restoration effort is doomed to fail because of problems inherent to the military.

"[T]he military continues... to fight what it sees as an erosion of its right to immunity from the laws of the land. Despite the vast environmental debacle the U.S. military has caused, the Pentagon insists on running its cleanup program entirely on its own, resisting outside regulation and oversight at every chance."<sup>149</sup>

The critic's comments may be a bit bombastic. There can be no denying that military agencies have taken the lead in developing sources of technical and managerial expertise to conduct DERP projects. Some of the sources are organic, such as the U.S. Air Forces' Human Systems Division (HSD), the

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<sup>149</sup> Shulman, supra note 34, at 47. Among the characteristics Shulman cites to the military effort are lack of money, recalcitrance, lack of communications within the military structure, a penchant for obsessive secrecy, bureaucratic inertia, ineptitude, and outright arrogance and indifference to public health. Shulman, supra note 34, at 8, 10, 17, 18, 46-47, 51, 86, 99, 109, & 121. See generally Mike Rothmel, When Will the Federal Government Waive Sovereign Immunity Defense & Dispose of Its Violations Properly?, 65 Chi.-Kent L. R. 581 (1989).

Naval Facilities Engineering Command, the U.S. Army Corps of Engineers,<sup>150</sup> and the Air Force's 11th Civil Engineering Operational Squadron in Alaska.<sup>151</sup> Another source of expertise is private industry, which performs the RI/FS design and planning work, as well as the actual remediation work.

Despite the downsizing of the DOD and the uncertainties of liability, environmental contracting for DOD is viewed as a growth industry by the private sector<sup>152</sup>. Major DOD contractors are trying to reduce their reliance on defense system programs by developing toxic waste control as an area in which they can exploit their own system management

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<sup>150</sup> Grant S. Bowers, Defense Contracts for Hazardous Waste Cleanup, 32 Cont. Mgmt. 14, 17 (April 1992).

<sup>151</sup> Lt Col Patrick Coullahan, 11th CEOS/CC 11th ACW Installation Restoration Program Briefing, at Elmendorf AFB AK, May 1992.

<sup>152</sup> Christopher Fotos, Dwindling Defense Budgets Prompt Exploration of Toxic Waste Control, Aviation Week & Space Technology, 6 April 1992, at 50; Brian Bremner, If You Can't Build Weapons, Destroy Them, Business Week, 9 March 1992, at 89; Don L. Boroughs, Good News For Cleanup Crews, U.S. News & World Report, 21 Nov. 1988, at 56. However, others note that there are few incentives and many deterrents from participating in Federal cleanup contracts. Enormous liability exposure, uncertain commitment on part of Congress to long term funding of projects, extremely low profit returns given the high risk involved, possibility of adverse publicity if complications arise, and little prospect of retaining data rights for new technologies developed in pursuing environmental work, all contribute to the lack of enthusiasm of some potential environmental contractors. Stuart B. Nibley, Keith A. Onsdorf, The Unmovable Object (National Security) Meets the Irresistible Force (Environmental Protection): Result - Government Contractors Are Being Crushed By the Impact of the Equally Paramount Objectives, 55 Fed. Cont. Rpt. (BNA) 878 (17 June 1991).

expertise<sup>153</sup>. Virtually all of the site assessments, planning, designing, and actual cleanup work done at Federal facilities is performed by private contractors<sup>154</sup>.

In some ways, procurement of environmental construction and services is like other source selections. The same basic acquisition statutes and regulations apply. The same basic source selection procedures apply. However in other aspects, DOD environmental acquisitions pose special, if not unique, challenges to the contracting agency. As noted infra Part II.B, simply defining the term "cleanup contracts" can be evasive. Remediation efforts are difficult to standardize. In many ways, each contract is a tailored effort to address a specific set of challenges at a single site<sup>155</sup>. Another

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<sup>153</sup> Bruce A. Smith, Toxic Waste Cleanup: Challenges & Opportunities Contractors Pursue Potential \$200 Billion Cleanup Market, Aviation Week & Space Technology, 6 Apr 1992, at 44-47; Seymour, supra note 3, at 491, 499, & 544.

<sup>154</sup> Cleaning Up Federal Facilities: Controversy Over An Environmental Peace Dividend, supra note 35.

<sup>155</sup> Each site may pose its own unique or idiosyncratic technical challenges. Restoration may be as simple as digging up contaminated material and transporting it to a new burial site, or the generic asbestos abatement effort. Dade W. Moeller, Environmental Health, 117 (1992). The task may require more exotic methods such as bioremediation. Moeller, supra. Another exotic method is in situ vitrification which is a thermal treatment process that converts contaminated soil into chemically inert, stable glass and crystalline products. V.F. Timmerman, In Situ Vitrification: A New Process For Waste Remediation - Briefing, 2nd International Conference on New Frontiers for Hazardous Waste Management, 27-30 Sep. 1987. An excellent overview of the current remediation techniques is found in Melvin Kopstein, Science For Superfund Lawyers, 19 Env'tl. L. Rptr. 10338 (Sep. 1989). A recent development may create a new forum for the political challenges associated with an individual site. The Clinton Administration and some

unique aspect is the use of DERA funding<sup>156</sup>. Further complicating these variabilities is the fact that most contract professionals are unfamiliar with environmental contracting, resulting in their being overly cautious<sup>157</sup>.

Private contractors performing tasks related to the cleanup of DOD sites do not enjoy immunity from liability for their actions. Environmental architect-engineering firms and their subcontractors involved in the design, planning, and investigation of a remediation project may be liable to the government for design defects on environmental remediation plans and designs<sup>158</sup>. Similarly, a contractor performing

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members of the U.S. Congress propose to increase the role of citizens in the DOD cleanup effort with the creation of site-specific advisory boards in which citizens would have a voice in the legal, technical, and funding aspects of the particular remediation project. Federal Facilities: Browner Appears Receptive To Plan For Government Cleanup, Officials Say, 23 Env't. Rptr. (BNA) 3083 (2 April 1993), available on WESTLAW, environmental library, BNA file. The proposal is often referred to the "Keystone Dialogue", "Keystone Report", or "Keystone Initiative". To what degree this initiative will affect the agency's ability to select a contractor and to administer the remediation contract remains to be seen.

<sup>156</sup> As noted infra at Part II.B., SARA § 211, 10 U.S.C. § 2703 (1986), established DERA to carry out the functions relating to environmental restoration at DOD sites.

<sup>157</sup> Richard L. Porterfield, Facilitating The Flow: Thoughts On Unsticking the Procurement Process in Environmental Contracting, 32 Cont. Mgmt. 22, 23 (Apr. 1992).

<sup>158</sup> FAR 52.236-23. See generally Craig R. Schnauder, Liability of the Architect-Engineer for Construction Contracts, 16 Pub. Cont. L. J. 365 (May 1987), 24 Y.P.A. 553; Everett L. Herndon & Shu S. Liao, Architect & Engineering Contracts: New Insights Into Cost Estimation, 17 Nat. Cont. Mgmt. 51 (1983), 20 Y.P.A. 857; Norman J. Slawsky, The Architect-Engineer Selection Process: To Bid or Not To Bid, 11 Pub. Cont. L. J. 232 (Nov. 1979); Thomas E. Shea, Architects

remediation activities on the site may be liable by virtue of its actions under the contract to third parties in tort or for additional remedial work not contemplated by the original contract. As originally enacted in 1980, CERCLA contained no special provision for contractor liability. By 1986, contractors' concern over their potential liability and agencies' need for a reliable pool of contractors convinced Congress to add provisions for conditionally insulating contractors from liability<sup>159</sup>. Congress amended the Act in 1986 adding § 119 which stated that a contractor engaged in remedial or removal action, with respect to a release or threatened release of hazardous substances, will not be liable under Federal law for injury, costs, damage, expenses, or other liability, including claims for indemnification, from that release<sup>160</sup>. Protection from liability is not extended to those situations where the contractor's conduct is negligent, grossly negligent or which constitutes intentional

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& Engineering: Liability Suits By The Government, 19 A.F.L. Rev. 250 (1970), 15 Y.P.A. 77.

<sup>159</sup> See Joel S. Moskowitz, Superfund Contractor Indemnification: A Cure In Search Of A Disease, 20 Env'tl. L. Rptr. 10333 (Aug. 1990); Thomas M. Armstrong & Anne O'Leary, Contracting for Environmental Assessments & Remedial Action, 761 PLI/Corp. 65 (Dec. 1991); Frank P. Grad, Contractual Indemnification of Government Contractors, 4 Admin. L. J. Am. U. 433, 453 (Winter 1991).

<sup>160</sup> SARA § 119, 42 U.S.C. § 9619(a)(1) (1986). See A. Patrick Nucciarone, Response Action Contractor Liability, 343 PLI/Real 501 (1 Dec. 1989).

misconduct<sup>161</sup>; liability of an employee<sup>162</sup>; or to any warranty under Federal, state, or common law<sup>163</sup>. CERCLA § 119 does not address a contractor's potential liability under state law, which presents the greatest potential for third party tort liability<sup>164</sup>. It does, however, grant EPA limited authority to indemnify contractors in third party negligence cases. Proposals have been suggested to augment the limited indemnification of environmental contractors, but no consensus has been reached as to the limits or scope of that indemnification<sup>165</sup>.

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<sup>161</sup> 42 U.S.C. § 9619(a)(2) (1986); DFARS 223.70 (DAC 91-2) & DFARS 252.223-7005 (DAC 91-2). See Explanatory Text to DAC 91-2, 57 Fed. Reg. 53596, Nov. 12, 1992, reprinted in Govt. Cont. Rpts. (CCH) ¶ 99,595 (23 Nov. 1992).

<sup>162</sup> 42 U.S.C. § 9619(a)(3) (1986).

<sup>163</sup> 42 U.S.C. § 9619(a)(4) (1986).

<sup>164</sup> Armstrong & O'Leary, supra note 159, at 71.

<sup>165</sup> The U.S. Senate proposed an amendment to the 1993 Defense Authorization Bill, S. 3114, which would have directed the DOD to promulgate regulations to indemnify cleanup contractors for the risks associated with the remediation effort. The proposal generated as much criticism as support. In an eleventh hour compromise the indemnification proposal was dropped from the bill. In return, DOD was tasked to study the indemnification issue and submit its findings and recommendations to Congress by 15 May 1993. EPA Concerned Over Defense Act's Contractor Defense, 20 Pesticide & Toxic Chemical News (7 Oct. 1992), available in LEXIS, environmental library, periodical file; Indemnification Battle Looms in Senate, 3 Defense Cleanup, 18 Sep. 1992, available in LEXIS, environmental library, periodical file; Cleaning Up Federal Facilities: Controversy Over An Environmental Dividend, supra note 35. See generally EPA Limits Indemnification to \$50 Million, 7 Superfund Week (22 Jan. 1993), available in LEXIS, environmental library, periodical file.

#### D. GOVERNMENT LIABILITY FOR ITS INDEPENDENT CONTRACTORS

Any indemnification under CERCLA § 119 increases the need to carefully select contractors, because selection of an unqualified contractor could result in claims against the Government. Despite the Act's limited liability provisions, the Federal agencies have a vested interest in minimizing its potential risks by selecting only responsible contractors. No case better illustrates the risks to the Federal government involved in using independent contractors for environmental efforts than Dickerson, Inc. v. United States.<sup>166</sup>

In 1981, the Defense Property Disposal Service (DPDS), a DOD agency, entered two contracts with a private firm, AEC, to transport and dispose of PCBs. In accordance with the contracts, AEC was paid in full for disposal upon proof of removal of the PCBs from the Federal facilities, as opposed to payment upon proof of proper disposal. DPDS employed a manifest system<sup>167</sup> to keep track of the hazardous material, but no one at DPDS followed up and checked to see whether AEC properly disposed of the PCBs.

AEC did not. The company commingled the PCBs with waste oil and sold it to a third party as waste fuel. Eventually the PCB-laced oil was sold to Dickerson, Inc. as low-grade waste fuel, which was to be used in Dickerson's paving

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<sup>166</sup> 875 F. 2d 1577 (11th Cir. 1989).

<sup>167</sup> 40 C.F.R. § 262.20-262.23 (1990).

business. In 1982 Dickerson discovered the fuel it purchased was contaminated with a high concentration of PCBs. The tainted fuel had to be disposed of as hazardous waste and Dickerson's storage tanks had to be purged and cleaned.

Dickerson, Inc. brought suit against the Government under the Federal Tort Claims Act, alleging that DPDS was negligent in selecting AEC and in not properly supervising the contractor's performance. The Government responded that it was excluded from liability under independent contractor and discretionary-function exceptions under the FTCA.

The U.S. District Court for the Middle District of Florida entered judgment for Dickerson<sup>168</sup>. The Government appealed. In affirming the District Court's judgment, the 11th Circuit held that DPDS was liable under both CERCLA §§ 107 & 120, as well as under Florida State law. The agency had a non-delegable duty to take precautions to ensure that the contractor properly disposed of the PCBs in a manner that complied with State and Federal law. The Circuit Court found the Government's reliance on the independent contractor and the discretionary-function exceptions unpersuasive<sup>169</sup>.

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<sup>168</sup> 685 F. Supp. 1555 (M. D. Fla. 1987).

<sup>169</sup> The Court of Appeals ruled that the discretionary function to the Federal Tort Claims Act protects only governmental actions and decisions involving permissible exercise of policy judgment. It does not apply when a Federal statute, regulation, or policy specifically prescribes a course of action for government employees to follow. The defense does not apply to a contractual arrangement with a third party or to one who has not exercised due care with respect to the hazardous waste and has not taken precautions



Perhaps a more aggressive responsibility determination before award would not have foreseen that AEC would improperly dispose of the PCBs. Perhaps the agency's liability is borne out of its incomplete and faulty administration of the two AEC contracts. However, there is still no complete guarantee that AEC will not be determined capable and willing to perform another Federal contract for similar services. Would another CO in another agency find AEC responsible? Would another agency discover that AEC had been a "bad actor" in the recent past?

The problem with sorting out "bad actors" is not unique to DOD remediation efforts. The EPA lacks a comprehensive mechanism to screen out nonresponsible, hazardous waste disposal applicants and has had problems managing its environmental cleanup contractors<sup>170</sup>. Similarly, DOE is reported to have had ongoing problems evaluating its remediation contractors' performance, controlling excessive contractor overhead costs, and preventing contractor

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against foreseeable consequences of the third party's foreseeable acts or omissions. The Court concluded that the DPDS contracting staff's failure to insure that the contractor hired to remove the oil containing PCBs from the military installations properly disposed of the oil did not fall within the discretionary function exception to the FTCA. 875 F.2d at 1581.

<sup>170</sup> James M. Strock & Brian A. Runkel, Environmental Bad Actors & Federal Disqualification, 15 Harv. Envtl. L. Rev. 529 (1991); Browner Assails EPA Legacy of Contract Mismanagement, Vows Changes, 16 Chemical Regulation Reporter, 12 March 1993, at 2381.

fraud.<sup>171</sup> It is safe to assume that every government agency is susceptible to contracting with "bad actors". Can the agencies mitigate their risks? As indicated in Dickerson, Inc. v. U.S. the liability can be very high and very real.

### PART III

#### RESPONSIBILITY OF ENVIRONMENTAL CLEANUP CONTRACTORS

##### A. INTRODUCTION TO THE CONCEPT OF RESPONSIBILITY

##### 1. AUTHORITY TO REQUIRE RESPONSIBILITY

The concept that a contractor seeking a Federal contract must be responsible is not a new innovation<sup>172</sup>. The advertisement for an early Federal government contract in 1782 advised merchants that only responsible bidders would be

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<sup>171</sup> Pasternak, supra note 79, at 36.

<sup>172</sup> The following discussion is a quick review of the historic use of "responsibility" of the offeror/bidder as a factor to be considered by the Federal contracting staff during the selection of an awardee for a Federal contract. While the following discussion and the related cases are old and do not relate specifically to the procurement of environmental contracts, they serve the purpose of putting the concept of "responsibility" in its proper perspective for those readers not familiar with the acquisition process.

considered<sup>173</sup>. More recently, the General Accounting Office<sup>174</sup> has held that a low bidder could be denied award by the contracting authority where it could show the bidder lacked the capability to perform<sup>175</sup>, adequate financial resources<sup>176</sup>, the necessary equipment<sup>177</sup>, or had a history of prior performance problems<sup>178</sup>. It has been consistently recognized that the Government has the right to inquire into whether the prospective low bidder possessed such elements of responsibility as skill, integrity, experience in similar

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<sup>173</sup> James F. Nagle, A HISTORY OF GOVERNMENT CONTRACTING, 52 (1992); James F. Nagle, FEDERAL PROCUREMENT REGULATIONS, POLICY, PRACTICE AND PROCEDURES, 14 (1981); Howard L. Speight, Current Procedures For Performing Meaningful Discussions in Federal Negotiated Procurements Are Uneconomical, Inefficient, & Ineffective-A Proposal For Improvement, 21 St. M. L. J. 985 (1990).

<sup>174</sup> For more than 60 years the GAO has provided a forum for resolution of disputes concerning the award of Federal contracts. Bidders & other interested parties may seek relief with GAO for awards of contracts they perceive were awarded unfairly, illegally, or improperly. GAO's procedures in this area are governed by their bid protest regulations at 4 C.F.R. Part 21, implementing 10 U.S.C. § 3551, et seq. (1991). For a basic review the history of the Comptroller General's & GAO's role in bid protests see Paul Shnitzer, GOVERNMENT CONTRACT BIDDING (Fed. Pubs. 3rd ed.) at 22-5 (1987).

<sup>175</sup> Comptroller General Decision [hereinafter Comp. Gen. Dec.] B-124614, 35 Comp. Gen. 161 (Sep. 29, 1955); Comp. Gen. Dec. A-15545, 6 Comp. Gen. 210 (Sep. 24, 1926).

<sup>176</sup> Comp. Gen. Dec. A-57819, 14 Comp. Gen. 305 (Sep. 20, 1934).

<sup>177</sup> Comp. Gen. Dec. B-12466, 20 Comp. Gen. 903 (June 18, 1941); contrast Comp. Gen. Dec. A-51743, 13 Comp. Gen. 305 (Apr. 11, 1934)

<sup>178</sup> Comp. Gen. Dec. B-142055, 39 Comp. Gen. 705 (Apr. 12, 1960).

work, and financial resources<sup>179</sup>. However, the GAO balanced this recognition of the Government's inherent authority with the concept that the agency could not be arbitrary in the execution of its procurements<sup>180</sup>.

The principle that the Federal government has the authority to refrain from awarding contracts to firms that lack responsibility is based in statute<sup>181</sup> and implemented by regulation<sup>182</sup>. The Federal acquisition regulation requires that the contracting officer (CO) on each acquisition make a determination of responsibility of awardee prior to award of

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<sup>179</sup> Comp. Gen. Dec. B-120579, 34 Comp. Gen. 227 (Nov. 18, 1954); Comp. Gen. Dec. B-63775, 26 Comp. Gen. 676 (Feb. 13, 1947). In a decision involving a federal contract for the incineration of municipal sewage sludge in the District of Columbia the GAO agreed with the contracting officer in finding that the low bidder was not responsible or responsive. The Comptroller General said the Government is obliged to look at the prospective contractor's financial resources, judgment, ability, integrity & fitness, and ability to successfully perform the contract prior to making award. Comp. Gen. Dec. B-99854, 30 Comp. Gen. 235 (Dec. 12, 1950).

<sup>180</sup> The GAO found that the agency had been arbitrary where the contractor had been automatically considered nonresponsible based upon a single incident of unsatisfactory past performance, even where it had resulted in a termination for default. Such past performance, while relevant, was not definitive on the issue of responsibility, unless it had resulted in a formal debarment. Comp. Gen. Dec. B-116078, 33 Comp. Gen. 265 (Dec. 14, 1953); Comp. Gen. Dec. B-73902, 27 Comp. Gen. 621 (Apr. 9, 1948); Comp. Gen. Dec. A-63562, 15 Comp. Gen. 149 (Apr. 21, 1935).

<sup>181</sup> 10 U.S.C. §§ 2304g, 2305 (1990); 41 U.S.C. § 253 (1990). Earlier sources of authority include the Armed Services Procurement Act, 10 U.S.C. §§ 2305(c) & 2304(g) and the Federal Property & Administrative Services Act, 41 U.S.C. § 253(b).

<sup>182</sup> FAR 9.103(a); Ralph C. Nash, Jr. & John Cibinic, Jr., FORMATION OF GOVERNMENT CONTRACTS, 204 (2d ed. 1986).

the contract<sup>183</sup>. In the absence of information indicating that the prospective contractor is responsible, the contracting officer must make a determination of nonresponsibility<sup>184</sup>. The rationale for the policy that government contracts should only be awarded to responsible contractors is based on pure pragmatism. Award of a contract to a contractor based on the lowest evaluated price can be false economy where the contract performance results in a default or additional contractual or administrative costs<sup>185</sup>. While it is important that government purchases be made at the lowest price, this does not require an award to a contractor solely because that supplier submits the lowest price. The burden of proof is on the prospective contractor to affirmatively demonstrate its responsibility including, when necessary, the responsibility of its proposed subcontractor<sup>186</sup>. A prospective contractor may challenge a nonresponsibility determination by appealing the CO's decision to the agency, the General Accounting Office, General Services Board of Contracting Appeals, or the appropriate Federal

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<sup>183</sup> 10 U.S.C. §§ 2305(b)(3) & (b)(4)(D) (1990); FAR 9.103(b); Moran Construction, B-241474, Jan. 7, 1991, 91-1 CPD ¶ 16.

<sup>184</sup> FAR 9.103(b).

<sup>185</sup> FAR 9.103(c).

<sup>186</sup> Id.

courts<sup>187</sup>.

The term "responsibility" refers to the offeror's apparent present ability and willingness to perform its contractual duties<sup>188</sup>. Responsibility of the awardee is made prior to award. If a firm initially appears to be unqualified the contractor may become eligible for award by taking necessary steps to attain responsibility by time of award<sup>189</sup>. Responsibility applies to both sealed bids and negotiated competitive proposals<sup>190</sup>. The FAR defines "responsible prospective contractor" as one that meets the standards listed in

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<sup>187</sup> GAO, 31 U.S.C. § 3551 & 4 C.F.R. Part 21 (1991), see also Ameron, Inc. v. U.S. Army Corps of Engineers, 787 F.2d 875 (3rd Cir. 1986), upheld on rehearing 809 F.2d 979 (1986), Honeywell, Inc. v. U.S., 870 F.2d 644 (Fed. Cir. 1989); GSBCA, 40 U.S.C. § 759(h); Claims Court, 28 U.S.C. § 1491(a)(1) & (3), see also Heyer Products v. U.S., 140 F.Supp. 409 (1956), John C. Grimberg Co. v. U.S., 702 F.2d 1362 (Fed. Cir. 1983); Federal courts, 5 U.S.C. § 702 & 28 U.S.C. § 1346(2), see also Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (1970), M. Steinthal & Co. v. Seamans, 455 F.2d 1289 (D.C. Cir. 1971).

<sup>188</sup> J. Baranello & Sons, B-192221, May 9, 1979, 58 Comp. Gen. 509 (1979), 79-1 CPD ¶ 322; National Technical Services, Inc., B-191096, Feb. 16, 1978, 78-1 CPD ¶ 138; Empire Manufacturing Company, Inc., B-180433, Feb. 8, 1974, 74-1 CPD ¶ 60.

<sup>189</sup> Nash & Cibinic, supra note 182, at 205. In Colt Industries, B-231213.2, Jan. 23, 1989, 89-1 CPD ¶ 49, the preaward survey recommended a finding of nonresponsibility due to Colt's high deficiency rate in recent contracts. The CO overruled the PAS, noting the firm's recent efforts resulted in significant corrections. GAO upheld the CO's finding. See also Blount, Inc. v. United States, 22 Cl. Ct. 221, 226 (1990); Mack Trucks, Inc. v. United States, 6 Cl. Ct. 68, 71 (1984).

<sup>190</sup> FAR 9.102. While responsibility is an inherent consideration in both sealed bids and competitive negotiations, how responsibility is evaluated in each procedure varies. See infra at Part III.B.

FAR 9.104<sup>191</sup>. Those standards can be categorized as either performance standards or eligibility standards of responsibility.

## 2. PERFORMANCE STANDARDS

Performance related standards of responsibility include general standards, which are mandated by the FAR, and special standards, which are tailored for a particular acquisition and are within the discretion of the contracting officer<sup>192</sup>. General standards of responsibility apply to all prospective contractors, in all acquisitions. They are designed to address whether the prospective awardee possesses the ability to perform its contract duties in a satisfactory manner, and whether the contractor has the determination or the will to use its ability to complete the work<sup>193</sup>. Related to the factor of the contractor's will is the issue of whether the contractor has sufficient integrity to justify reliance on the agreement to perform<sup>194</sup>.

To determine whether a prospective contractor has the capability to perform the work prescribed in the contract a CO must decide whether the contractor presently has: adequate

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<sup>191</sup> FAR 9.101.

<sup>192</sup> FAR 9.104-1; FAR 9.104-2.

<sup>193</sup> FAR 9.104-3(1).

<sup>194</sup> FAR 9.104-1(d).

financial resources to perform the contract, or the ability to obtain them<sup>195</sup>, the ability to comply with the required or proposed delivery schedule<sup>196</sup>, a satisfactory performance record<sup>197</sup>, the necessary organization, experience, accounting and operational controls, technical skills or the ability to obtain them<sup>198</sup>, and the necessary production, construction, and technical equipment and facilities, or the ability to obtain them<sup>199</sup>. Such standards apply to every Federal acquisition.

A contractor having the ability to perform may nonetheless be declared nonresponsible if there is evidence that the prospective contractor lacks the will to perform. The CO must determine whether there is sufficient evidence indicating the contractor has the perseverance and tenacity to perform acceptably<sup>200</sup>, and a satisfactory record of integrity and business ethics<sup>201</sup>.

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<sup>195</sup> FAR 9.104-1(a) [FAC 84-18, FAC 90-8]; FAR 9.104-3(b)[FAC 84-38, FAC 84-39, FAC 90-8]; DLA FAR Supp. 9.106-2(90)(a).

<sup>196</sup> FAR 9.104-1(b) [FAC 84-18, FAC 90-8].

<sup>197</sup> FAR 9.104-1(c) [FAC 84-18, FAC 90-8]; FAR 9.104-3(c) [FAC 84-38, FAC 84-39, FAC 90-8]; NAV FAR Supp. 5209.104-3(c); DLA FAR Supp. 9.104-1(c)(91).

<sup>198</sup> FAR 9.104-1(e) [FAC 84-18, FAC 90-8]; FAR 9.104-3(b) [FAC 84-38, FAC 84-39, FAC 90-8]; DFARS 209.104-1(e).

<sup>199</sup> FAR 9.104-1(f) [FAC 84-18, FAC 90-8]; FAR 9.104-3(b) [FAC 84-38, FAC 84-39, FAC 90-8]; DLA FAR Supp. 9.106-2(90)(a).

<sup>200</sup> FAR 9.104-3(c) [FAC 84-38, FAC 84-39, FAC 90-8].

<sup>201</sup> FAR 9.104-1(d) [FAC 84-18, FAC 90-8].



Performance related standards may also include specifically tailored responsibility standards, such as special facilities or unusual experience, when past experience has shown that additional, special standards or "definitive criteria" are needed for adequate contract performance<sup>202</sup>. Any special standards must be set forth in the solicitation and applied to all offerors<sup>203</sup>. Such performance related standards lend themselves to application in the acquisition of environmental services or construction.

### 3. ELIGIBILITY STANDARDS

A prospective contractor that is otherwise capable and willing to perform may be excluded from award if it does not meet the statutory or regulatory requirement specified in the solicitation. These requirements are sometimes referred to as "collateral" because they do not directly relate to the work specified in the solicitation<sup>204</sup>. The FAR states that a prospective contractor must be otherwise qualified and eligible to receive an award under applicable laws and regulations<sup>205</sup>. Collateral requirements appear to be dis-

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<sup>202</sup> FAR 9.104-2(a).

<sup>203</sup> FAR 9.104-2(a).

<sup>204</sup> Nash & Cibinic, supra note 182, at 224-245.

<sup>205</sup> FAR 9.104-1(g) [FAC 84-18, FAC 90-8]; DFARS 209.104-1 specifically prohibits award to a firm or subsidiary that has a conflict of interest in accordance with 10 U.S.C. § 2327(b), or that has been determined by the Secretary of State under 50

tinct issues apart from the general standards. Yet, in practice, they could arguably be woven back into the general standards of responsibility by the generic requirement that the prospective contractor be otherwise qualified and eligible to receive award under applicable laws and regulations<sup>206</sup>.

#### 4. SUBCONTRACTORS

A prospective contractor may have to affirmatively demonstrate not only its own responsibility but, when necessary and relevant, the responsibility of its proposed subcontractors<sup>207</sup>. Generally, it is the obligation of the prime contractor to determine the responsibility of its subcontractors<sup>208</sup>. There is no requirement for the CO to determine whether the apparent awardee's subcontractor is

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U.S.C. App. § 2405(j)(1)(A) to be a government or country that has repeatedly provided support for acts of international terrorism.

<sup>206</sup> FAR 9.104-1(g) [FAC 84-18, FAC 90-8]. For instance, an aggressive CO could require compliance with individual environmental statutes, other than the Clean Air Act & Clean Water Act which are referenced in FAR Part 23.1, through the generic provision at FAR 9.104-1(g). Such bootstrapping is not addressed in the military departments' FAR supplements. Since it is not expressly prohibited, FAR 9.104-1(g) could be used as an omnibus vehicle to apply environmental laws to all Federal acquisitions. But, it would be most useful where individual environmental statutes were applied to solicitations where a special concern or need warranted consideration or evaluation.

<sup>207</sup> FAR 9.103(c); NJCT Corp., B-219434, Sep. 26, 1985, 64 Comp. Gen. 884 (1985), 85-2 CPD ¶ 342; Omneco, Inc., B-218343, B-218343.2, June 10, 1985, 85-1 CPD ¶ 660.

<sup>208</sup> FAR 9.104-4(a) [FAC 84-18, FAC 90-8].

responsible, unless it is in the government's interest to do so<sup>209</sup>. When the CO does examine the responsibility of a subcontractor, it is determined in the same manner as is the responsibility of the prime contractor<sup>210</sup>.

## 5. SMALL BUSINESSES

There is a single situation where the broad discretion of the contracting officer's authority to make the responsibility determination does not apply. In a situation where the CO determines there is evidence of nonresponsibility and the contractor is a small business<sup>211</sup>, the CO cannot simply find the contractor nonresponsible. Instead, the CO must refer the matter to the Small Business Administration for its definitive review of the CO's recommendation<sup>212</sup>. In these cases the CO

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<sup>209</sup> FAR 9.104-4(b) [FAC 84-18, FAC 90-8]; FHC Options, Inc., B-246793.3, Apr. 14, 1992, 92-1 CPD ¶ 366.

<sup>210</sup> FAR 9.104-4(b) [FAC 84-18, FAC 90-8].

<sup>211</sup> The Small Business Administration is authorized by the Small Business Act, 15 U.S.C. § 631 et seq., to establish programs to encourage and enhance the opportunities for qualified small businesses to compete for Federal contracts. The SBA is solely authorized to determine whether a small business is responsible. This definitive determination of responsibility on a participatory small business is documented in a Certificate of Competency (COC). FAR 6.204; FAR Subpart 19.8. The CO may refer the matter to the SBA when it has documentation indicating the small business lacks any of the basic indicators of responsibility. FAR 19.602-1(a) [FAC 84-19]. See Modern Sanitation System, Corp., B-245469, Jan. 2, 1992, 92-1 CPD ¶ 9.

<sup>212</sup> FAR 9.103(b); FAR 19.602-1 [FAC 84-19]; FAR Subparts 19.6 & 19.8; PNM Construction, Inc. v. United States, 13 Cl. Ct. 745 (1987); PHE/MASER, Inc., B-238367.5, Aug. 28, 1991, 70

may direct an investigation to take place, but the legal effect of his finding is merely a recommendation to the SBA<sup>213</sup>. Upon referral, the SBA may disagree with the CO's recommendation and issue a Certificate of Competency (COC) despite the CO's reservations<sup>214</sup>, in which case, absent an appeal to the SBA based upon new evidence, the agency is bound by the SBA's determination<sup>215</sup>.

## B. RESPONSIBILITY AND SOURCE SELECTION PROCEDURES

The distinction between source selection procedures and contract types often confuses those not familiar with Federal contracts. One is closely intertwined with contractor responsibility. The other is irrelevant to responsibility. Each speaks volumes about the legal relationship between the parties of any particular procurement. As a means to characterize a Federal contract, a procurement is often

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Comp. Gen. 689 (1991), 91-2 CPD ¶ 210; F & H Mfg. Corp., B-244997, Dec. 1991, 91-2 CPD ¶ 520; Pro Fab, Inc., B-243607, Aug. 5, 1991, 91-2 CPD ¶ 128; Eagle Bob Tail Tractors, Inc., B-232346.2, Jan. 4, 1989, 89-1 CPD ¶ 5; Skillens Enterprises, B-202508, B-202508.2, Dec. 15, 1981, 61 Comp. Gen. 142 (1981), 81-2 CPD ¶ 472; Hatcher Waste Disposal, B-193065, Mar. 7, 1979, 58 Comp. Gen. 316 (1979), 79-1 CPD ¶ 157.

<sup>213</sup> General Painting Co., Inc., B-219449, Nov. 8, 1985, 85-2 CPD ¶ 530.

<sup>214</sup> FAR 19.602-3(a); J.R. Youngdale Const. Co. v. United States, 23 Cl.Ct. 460 (1991); Cavalier Clothes, Inc. v. United States, 810 F. 2d 1108 (Fed. Cir. 1987); Boston Shipyard Corp. v. United States, 9 Cl. Ct. 450 (1986); Hayes International Corp. v. United States, 7 Cl. Ct. 681 (1985).

<sup>215</sup> FAR 19.602-3(d).

described as either a "cost reimbursement" (CR) contract or a "fixed price" (FP) contract<sup>216</sup>. A contractor's ability to recover costs incurred in the course of performance is a function of whether a contract is a CR or a FP<sup>217</sup>. But FP & CR have no nexus whatsoever to the contractor's present responsibility.

With the passage of the Competition in Contracting Act of 1984 (hereinafter CICA)<sup>218</sup> the previous statutory preference for sealed bidding was eliminated<sup>219</sup>. Now agencies are encouraged to obtain "full and open competition" using the competitive procedure best suited under the circumstances of the procurement<sup>220</sup>. The procedure of determining a

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<sup>216</sup> FAR Subparts 16.2 & 16.3. A fixed price contract provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience during performance of the contract. A fixed price type of contract places on the contractor the maximum risk and the full responsibility for all costs & resulting profit or less. It also provides the maximum incentive for the contractor to control costs and to perform effectively in a cost-efficient manner. FAR 16.202-1. A cost reimbursement type contract provides for payment of allowable incurred costs to the extent prescribed in the contract. FAR 16.301-1.

<sup>217</sup> Seymour, supra note 3, at 527 & 538.

<sup>218</sup> 10 U.S.C. § 2301, et seq., as amended (1990).

<sup>219</sup> Military Base Management Inc., B-224115, Dec. 30, 1986, 66 Comp. Gen. 179 (1986), 86-2 CPD ¶ 720.

<sup>220</sup> 10 U.S.C. § 2304(a)(1); KIME Plus, Inc., B-232367, Oct 31, 1988, 88-2 CPD ¶ 420; Carter Chevrolet Agency, Inc., B-229679, Feb. 3, 1988, 88-1 CPD ¶ 107; A & C Building & Industrial Maintenance Corp., B-230270, May 12, 1988, 88-1 CPD ¶ 451; TLC Systems & King Fisher Company, B-227842, B-227842.2, Oct. 6, 1987, 87-2 CPD ¶ 341; TLC Systems, B-225871, Mar. 17, 1987, 87-1 CPD ¶ 297; Folk Construction Co., Inc., B-225560, Feb. 12, 1987, 87-1 CPD ¶ 157; Essex Electro Engineers, Inc., B-221114, Jan. 27, 1986, 65 Comp. Gen. 242

contractor's responsibility will vary depending upon the type of source selection process being used. The two main types of procurement procedures are sealed bid/formal advertisement<sup>221</sup> and the competitive proposal/ negotiation<sup>222</sup>. Two offshoots of the sealed bid procedures are the two-step procedure<sup>223</sup> and the four-step procedure<sup>224</sup>. The distinction between the source selection procedures must be clearly understood to appreciate the role of responsibility in each selection process.

## 1. SEALED BID/FORMAL ADVERTISING

Sealed bidding is a method that employs publicizing the invitation for bids, submission of sealed bids, public opening of the bids, evaluation of the bids without discussions, and award to the responsive and responsible bidder, considering only price and price-related factors which were listed in the invitation<sup>225</sup>. Sealed bid procedures must be used if: time

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(1986), 86-1 CPD ¶ 92.

<sup>221</sup> FAR Parts 14 & 15.

<sup>222</sup> FAR Part 15.

<sup>223</sup> FAR Subpart 14.5.

<sup>224</sup> DFARS 215.613-70.

<sup>225</sup> 10 U.S.C. § 2305(b)(3) (1990); FAR 14.101 [FAC 84-5]. To be responsive, a bid must represent an unequivocal offer to provide the exact thing called for in the IFB, such that acceptance of the bid binds the contractor in accordance with the solicitation's material terms and conditions. Western Air, Inc., B-230724, July 18, 1988, 88-2 CPD ¶ 59. It is a

permits, the contract award will be based on price and other price related factors, it is not necessary to conduct discussions with offerors, and there is reasonable expectation of receiving more than one bid<sup>226</sup>. After the public opening of the bids and the identification of the low priced bid, but prior to award of the contract, the CO must determine that the prospective awardee is responsible<sup>227</sup>, and the prices offered are reasonable<sup>228</sup>. If it cannot be demonstrated that the bidder is responsible, the CO must deny the bidder award.

For purposes of the responsibility determination, the critical distinction of a sealed bid procedure is that responsibility is a "yes" or "no", "go" or "no go", decision. The contractor either meets the minimal standards of responsibility or it does not<sup>229</sup>. Contractors with better credentials of responsibility cannot displace the low bidder on the basis of being more responsible. The contracting agency cannot balance the elements of responsibility with the price.

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fundamental rule of sealed bidding procurements that the responsiveness of a bid must be determined based upon the bid itself and not on basis of post bid opening submissions. Aldan Rubber Co., B-212673, Dec. 5, 1983, 83-2 CPD ¶ 645.

<sup>226</sup> 10 U.S.C. § 2304(a)(2)(A) (1984); FAR 6.401 [FAC 84-42]; ARO Corp., B-227055, Aug. 17, 1987, 87-2 CPD ¶ 165, aff'd 67 Comp. Gen. 16 (1987), 87-2 CPD ¶ 365.

<sup>227</sup> "Responsible" as defined at FAR 9.101 & 9.104-1 [FAC 84-18, FAC 90-8]. See also FAR 9.103(a).

<sup>228</sup> FAR 14.407-2(a).

<sup>229</sup> John Cibinic, Jr., Consideration of Past Performance In Contract Awards: "What is Past is Prologue", 6 Nash & Cibinic Report (N&CR) ¶ 8, at 19 (Feb. 1992).

The low bidder that meets the minimum standards of responsibility receives the award.

Due to the absence of discussions and the reliance on price and price related factors to the exclusion of quality related factors, sealed bidding is a method to acquire environmental services that allows the CO little discretion in the evaluation of competing bids. As the remediation project increases in complexity, the need for evaluation of the comparative merits of proposals increases. Concerns over non-cost related factors, such as past experience in handling hazardous waste or prior violations of environmental laws, may also be of increasing significance<sup>230</sup>. Owing its lack of flexibility, the sealed bid procedure is generally disfavored as an acquisition method for remediation type contracts. However, it is not without precedent<sup>231</sup>.

## 2. COMPETITIVE PROPOSALS/NEGOTIATED PROCUREMENT

Whenever sealed bids are not appropriate, competitive negotiations should be used<sup>232</sup>. By definition, negotiations

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<sup>230</sup> Two examples of using a competitive negotiations source selection for removal, disposal and management of hazardous waste are Laidlaw Environmental Services (GS), Inc., B-248417.2, Oct. 20, 1992, 92-2 CPD ¶ 255 & U.S. Pollution Control, Inc., B-248910, Oct. 8, 1992, 92-2 CPD ¶ 231.

<sup>231</sup> An example of the use of an IFB to procure hazardous waste removal is Earth Engineering & Sciences, Inc., B-248219, July 30, 1992, 92-2 CPD ¶ 72.

<sup>232</sup> FAR 6.401(b) [FAC 84-42].



are appropriate where the CO requires discussions to ensure that offerors fully understand the needs of the Government<sup>233</sup>. Similarly, negotiations are appropriate when the agency needs to evaluate factors other than cost and cost related factors<sup>234</sup>. Generally, the CAO will not question an agency's discretion in selecting the proper method of acquisition<sup>235</sup>. The procedures involved in competitive negotiations include the receipt of proposals, evaluation of the proposals by the source selection evaluation team (SSET), usually discussions, and usually the revision of offers by the offerors, followed by submission of best and final offers (BAFOs) and award<sup>236</sup>.

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<sup>233</sup> KIME/Plus, Inc., B-231906, Sep. 13, 1988, 88-2 CPD ¶ 237.

<sup>234</sup> W.B. Jolley, B-234490, May 26, 1989, 68 Comp. Gen. 444 (1989), 89-1 CPD ¶ 512. The GAO has struck down an award based on negotiated proposals, where price was the only evaluation criterion. The GAO found the RFP violated 10 U.S.C. § 2304(a)(2). Northeast Construction Co., B-243323, B-234406, Apr. 24, 1989, 68 Comp. Gen. 406 (1989), 89-1 CPD ¶ 402.

<sup>235</sup> The GAO will question the use of negotiated proposals in lieu of sealed bidding only where the determination was shown to be unreasonable. A.J. Fowler Corp., Reliable Trash Service, Inc., B-233326, B-233326.2, Feb. 16, 1989, 68 Comp. Gen. 444 (1989), 89-1 CPD ¶ 166; W.B. Jolley, B-234490, May 26, 1989, 68 Comp. Gen. 444 (1989), 89-1 CPD ¶ 512.

<sup>236</sup> FAR 15.102 [FAC 84-5]; FAR 15.61 [FAC 84-5, FAC 84-16]; FAR 15.612 [FAC 84-5, FAC 84-60, FAC 90-7]. As an aside, the Claims Court has upheld the atypical procedure of a contracting officer serving as the sole evaluator of Proposals. The CO was the lone member of the "source selection evaluation team". The Court, with apparent reluctance, found the Federal acquisition regulations did not prohibit the unusual practice. CACI Field Services, Inc. v. United States, 13 Cl. Ct. 718, 729 (1983). Such an unusual procedure as used in CACI would not lend itself to most

The evaluation of the proposals is directed by the evaluation factors listed in the solicitation<sup>237</sup>. The factors include cost or cost related factors, and non-cost or non-price related factors and any significant subfactors that will be considered in awarding the contract<sup>238</sup>. Communications between the SSET and the offeror are allowed in the competitive proposal process. The CO may ask the offeror for "clarifications"<sup>239</sup> or "discussions". A "discussion" is any written or oral communication between the Government and an offeror that involves information essential for determining the acceptability of a proposal, or provides the offeror an

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environmental procurements. There are probably very few individuals in the contracting agencies who can legitimately serve as their own technical advisor on acquisitions as complex and technical as environmental construction/services. Those individuals who feel they can, should be strongly encouraged to use the agency resources available to them.

<sup>237</sup> The evaluation factors can be found in Section M of the solicitation. FAR Table 15-1 & FAR 15.406-1 [FAC 84-5, FAC 84-37, FAC 84-53]; FAR 15.406-5(c) [FAC 84-5, FAC 84-16, FAC 84-37, FAC 90-7]. Other matters of concern to the SSET may be identified in Section H of the solicitation. FAR 15.406-2(h) [FAC 84-18, FAC 83-37, FAC 84-49, FAC 84-53]. "Solicitations" as used in contracting by negotiation refer to requests for proposals and may include requests for quotes (other than those excluded by FAR 15.401). FAR 15.407(a) [FAC 84-5, FAC 84-49].

<sup>238</sup> FAR 15.406-5(c) [FAC 84-5].

<sup>239</sup> Clarifications are communications with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in the proposal. It is achieved by explanation or substantiation, either in response to a government inquiry or as initiated by offeror. Unlike discussion, it does not give the offeror the opportunity to revise or modify its proposal, except to the extent that correction of apparent clerical mistakes results in a revision. FAR 15.601 [FAC 84-5].

opportunity to revise or modify its proposal<sup>240</sup>. Discussions can serve several purposes in the competitive negotiation process: to maximize effective competition, to resolve uncertainties relating to the acquisition, to assure that all offerors are treated fairly and on an equal basis, and to assure that the government obtains a sufficient number of technically acceptable proposals, without "technical transfusion" or "technical levelling"<sup>241</sup>.

Examination of a prospective contractor's responsibility may take place during the evaluation of the proposals where the technical evaluation criteria may include responsibility related criteria, such as past performance record<sup>242</sup>.

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<sup>240</sup> FAR 15.601. See Timothy J. Rollins, A Lawyer's Guide to The Requirement For Meaningful Discussions in Negotiated Procurements, 122 Mil. L. Rev. 221 (Fall 1988).

<sup>241</sup> Nash & Cibinic, supra note 182, at 609-612. The CO has broad discretion to decide whether discussions are needed and how they will be conducted with the offerors. The CO shall: control all discussions; advise the offeror of deficiencies in its proposals so that the offeror is given an opportunity to satisfy the Government requirements; attempt to resolve any uncertainties concerning the technical proposal & other terms or conditions of the proposal; resolve any suspected mistakes by calling them to the offeror's attention as specifically as possible without disclosing information concerning other offerors' proposals or the evaluation process. FAR 15.610(c). Any discussions conducted must be "meaningful". FAR 15.610(b). See also E. L. Hamm & Assoc., B-250932, Feb. 13, 1993, 93-1 CPD ¶ 156; Steinhoff & Sadler, Inc., B-246604, B-246604.3, Mar. 20, 1992, 92-1 CPD ¶ 299; Arthur Anderson & Co., B-245903, B-245903.2, Feb. 10, 1992, 92-1 CPD ¶ 168; Son's Quality Food Co., B-244528.2, Nov. 4, 1991, 91-2 CPD ¶ 424; URS Int'l, Inc., et al., B-232500, B-232500.2, Jan. 10, 1989, 89-1 CPD ¶ 21; Global Assoc., B-212820, Apr. 9, 1984, 84-1 CPD ¶ 394; Alan-Craig, Inc., B-202432, Sep. 29, 1981, 81-2 CPD ¶ 263; Pioneer Contract Services, Inc., B-197245, Feb. 19, 1981, 81-1 CPD ¶ 107.

<sup>242</sup> See infra Part III.G.

Whether or not there are responsibility criteria in the evaluation factors, the CO retains the responsibility to determine that the apparent contractor is responsible. As in the case with the sealed bid procedure, the offeror must be determined responsible to receive award. In other words, inserting responsibility related technical evaluation criteria does not replace the requirement for an affirmative determination of responsibility by the CO before making award<sup>243</sup>.

The key distinction of the competitive/negotiated proposal procedure is the focus of the contract authority on the relative assessment of the individual proposals. The evaluative criteria may include matters that are traditionally areas of responsibility<sup>244</sup>. Award need not be made to the low-priced proposal. A technical versus cost trade off may be made, and one sacrificed for the other, to the extent that the balance is rational and consistent with the evaluation factors identified in Section M of the RFP<sup>245</sup>. It is well established that the agency has the discretion to make award to the higher-priced, higher-rated proposal, where the price is less important or of equal importance to the agency than

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<sup>243</sup> Republic Environmental Systems, Inc., B-249898, Dec. 15, 1992, 92-2 CPD ¶ 417; Aydin Vector Div., B-244838, Nov. 13, 1991, 91-2 CPD ¶ 455.

<sup>244</sup> Folk Constr. Co., B-225560, Feb. 12, 1987, 87-1 CPD ¶ 157.

<sup>245</sup> Federal Environmental Services, Inc., B-250135.4, May 23, 1993, 93-1 CPD ¶ \_\_\_\_; Central Texas College, B-245233.4, Jan. 29, 1992, 71 Comp. Gen. 164 (1992); 92-1 CPD ¶ 121.

the technical evaluation factors, and the CO reasonably concluded that technical superiority of the awardee's proposal outweighed the higher price<sup>246</sup>. In other cases, the CO has the discretion to award to the lower-priced proposal where the offers are technically equal<sup>247</sup>. The ability to trade price for technical capability, and vice versa, in the evaluation process affords the CO flexibility that cannot be obtained in the sealed bid process<sup>248</sup>.

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<sup>246</sup> Federal Environmental Services, Inc., B-250135.4, May 24, 1993, 93-1 CPD ¶ \_\_; Oregon Iron Works, Inc., Lakeshore, Inc., B-250528, Jan. 29, 1993, 93-1 CPD ¶ 82; Atlantic Scaffolding Co., B-250380, Jan. 22, 1993, 93-1 CPD ¶ 55; P.E. Systems, Inc., B-249033.2, Dec. 14, 1992, 92-2 CPD ¶ 409; MagneTek National Electric Coil, B-249625, Dec. 4, 1992, 92-2 CPD ¶ 392; Bannum, Inc., B-249758, Nov. 24, 1992, 92-2 CPD ¶ 373; Premier Cleaning Systems, Inc., B-249179.2, Nov. 2, 1992, 92-2 CPD ¶ 298; Young Sales Corp., B-249336, Oct. 26, 1992, 92-2 CPD ¶ 280; North Pacific Seafoods, Inc., B-249133, Oct. 20, 1992, 92-2 CPD ¶ 262; Life Uniform Corp., B-248996, Oct. 9, 1992, 92-2 CPD ¶ 237; Network Systems Solutions, Inc., B-246555, Mar. 19, 1992, 92-1 CPD ¶ 294; General Services Engineering, Inc., B-245458, Jan. 9, 1992, 92-1 CPD ¶ 44; Virginia Technology Assocs., B-241167, Jan. 29, 1991, 91-1 CPD ¶ 80; Questech, Inc., B-236028, Nov. 1, 1989, 89-2 CPD ¶ 407.

<sup>247</sup> The Parks Company, B-249473, Nov. 17, 1992, 92-2 CPD ¶ 354; Process Control Technology, Inc., B-249395, Oct. 30, 1992, 92-2 CPD ¶ 312; Prospect Assocs. Ltd., B-249047, Oct. 20, 1992, 92-2 CPD ¶ 258. In a unusual case the GAO upheld the CO's decision to award to the higher cost offeror, where proposals were relatively equal in technical merit. Ebasco Constructors, Inc., B-244406, et al., Oct. 16, 1991, 91-2 CPD ¶ 341.

<sup>248</sup> The cost/technical trade-off is occasionally expressed as requiring the agency to make the source selection based upon "the best value to the government" or "quality". "Best value" and "quality" are ambiguous concepts that lend themselves to potential abuse by the CO. The Competition in Contracting Act of 1984 requires the government to consider cost/price in all its source selection decisions. 41 U.S.C. § 253b(d) (1988). Therefore, consideration of the cost/technical tradeoff as an indicator of value or quality is inherent in every acquisition. The extent to which price and

### 3. TWO-STEP PROCEDURE

Two-step bidding is a combination of competitive procedures designed to obtain the benefits of sealed bidding when adequate specifications are not available<sup>249</sup>. An objective is to permit the development of a sufficiently descriptive, and not unduly restrictive, statement of the government's requirements, including an adequate technical data package, so that the subsequent acquisitions may be made by conventional sealed bidding<sup>250</sup>. Step one consists of the request for submission, evaluation and, if necessary, discussion of a technical proposal<sup>251</sup>. No pricing is

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technical factors can be sacrificed for the other is governed by the tests of rationality & consistency with the established evaluation factors. Federal Environmental Services, Inc., B-250135.4, May 24, 1993, 93-1 CPD ¶ \_\_\_\_; Aerial Image Technology, B-251913, May 4, 1993, 93-1 CPD ¶ \_\_\_\_; AWM Enterprises, Inc., B-251790, April 30, 1993, 93-1 CPD ¶ \_\_\_\_; BENMOL Corp., B-251586, April 16, 1993, 93-1 CPD ¶ \_\_\_\_; JCI Environmental Services, B-250752, B-250752.3, April 7, 1993, 93-1 CPD ¶ \_\_\_\_; Federal Micro Systems, Inc., B-251243, Mar. 18, 1993, 93-1 CPD ¶ \_\_\_\_; Tracor, Inc., B-250716, B-250716.2, Feb. 23, 1993, 93-1 CPD ¶ \_\_\_\_; Strum, Ruger, & Co., B-250193, Jan. 14, 1993, 93-1 CPD ¶ 42; Central Texas College, B-245233.4, Jan. 29, 1992, 71 Comp. 164 (1992), 92-1 CPD ¶ 121; Latercoere Int'l, B-239113.3, Jan. 15, 1992, 92-1 CPD ¶ 70. If "best value to the government" is an inherent consideration in every source selection and the cost/technical trade-off is properly advertised in the solicitation, there is no practical reason for the government to include references to "best value" in solicitations for environmental construction or services.

<sup>249</sup> FAR 14.501 [FAC 84-5]; Shnitzer, supra note 174, at ten-2.

<sup>250</sup> FAR 14.501 [FAC 84-5].

<sup>251</sup> FAR 14.501(a) [FAC 84-5].

involved at this stage<sup>252</sup>. Conformity to the technical requirements is resolved in step one, but the responsibility of the contractor is not<sup>253</sup>. Step two involves the submission of sealed bids by those who submitted acceptable technical proposals in the first step<sup>254</sup>. The prepriced bids are evaluated and award is made<sup>255</sup>.

#### 4. FOUR-STEP PROCEDURE

The four-step source selection procedure is another hybrid approach, which is well suited to environmental source selections. It is designed for those situations where the government wishes to focus on technical excellence. Proposals are evaluated, a competitive range established, and an apparent successful offeror selected without discussions of proposed deficiencies. Negotiations are conducted only in the final step and only with the apparent successful offeror<sup>256</sup>. In step one, all the technical proposals are evaluated<sup>257</sup>. In step two, cost proposals are requested, evaluated, and

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<sup>252</sup> Id.

<sup>253</sup> Id.

<sup>254</sup> FAR 14.501(b) [FAC 84-5].

<sup>255</sup> Id.; see also FAR Subparts 14.3 & 14.3.

<sup>256</sup> DFARS 215.613-70(a).

<sup>257</sup> DFARS 215.613-70 (f).

those offerors outside the range are eliminated<sup>258</sup>. In step three, the cost and technical BAFOs are evaluated and the best offeror is notified that award to it is conditionally premised upon successfully negotiating a definitive contract in a timely matter<sup>259</sup>. In the final phase, the contract price is negotiated and award is made<sup>260</sup>.

### C. RESPONSIBILITY DETERMINATION

As noted infra at Part II.A the CO has the duty to make an affirmative determination of the prospective contractor's responsibility before awarding the contract<sup>261</sup>. The CO must obtain sufficient information to be satisfied that the prospective contractor meets all applicable responsibility standards<sup>262</sup>. Ordinarily, the CO should limit requests for

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<sup>258</sup> DFARS 215.613-70(g).

<sup>259</sup> DFARS 215.613-70(h).

<sup>260</sup> DFARS 215.613-70(i).

<sup>261</sup> FAR 9.103(b). COs are encouraged, but not necessarily required, to obtain legal assistance & advice from their staff attorneys regarding any aspect of nonresponsibility. AFFARS 5301.601-95(a) [FAC 92-12]. Some of the other FAR supplements in DOD are silent on the requisite involvement by the agency attorneys. Each DOD agency needs to address whether its FAR supplements or departmental guidance need to be amended to require greater involvement by the staff attorneys in source selections concerning environmental projects. As the scope of environmental policies become more pervasive throughout the government procurement process, the role of the agency's environmental & contract legal staff will become increasingly important at all levels of the source selection process.

<sup>262</sup> FAR 9.105-1(a) [FAC 84-18, FAC 84-25, FAC 84-46].



information to the lowest priced, responsive bidder or those offerors in the competitive range for award<sup>263</sup>.

In some cases there may be enough data on hand to make a decision. In other cases the contracting agency may have to obtain additional evidence<sup>264</sup>. A nonexclusive list of sources of additional information include: the list of debarred, suspended contractors; records and experience data, including verifiable knowledge of personnel within the contracting office, audit offices, contract administration offices, and other contracting offices; bid or proposal information, financial data, questionnaire replies, and information regarding equipment and personnel from the prospective contractor itself<sup>265</sup>. The CO may also request information from the contractor's suppliers, subcontractors, customers of the contractor, financial institutions, Government agencies, and business and trade associations<sup>266</sup>.

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<sup>263</sup> FAR 9.105-1(b) [FAC 84-18, FAC 84-25, FAC 84-46]; DLA FAR Supp. 9.106-2(90).

<sup>264</sup> The Government has the right to consider information outside of an offeror's proposal to evaluate past performance, provided such action is consistent with the terms of the solicitation. Western Medical Personnel, Inc., B-227991, Sep. 28, 1987, 87-2 CPD ¶ 310; Engineers International, Inc., B-224177, Dec. 22, 1986, 86-2 CPD ¶ 699; Schneider, Inc., B-214746, Oct. 23, 1984, 84-2 CPD ¶ 448.

<sup>265</sup> FAR 9.105-1(c) [FAC 84-18, FAC 84-25, FAC 84-46]; FAR Subpart 9.4; DFARS 209.106; AFFARS Subpart 9.4. Past performance information (PPI) is now a required source of information on all contracts in excess of \$100,000. Office of Federal Procurement Policy - Policy Letter 92-5, 8 Jan. 1993.

<sup>266</sup> FAR 9.105-1(c)(5) [FAC 84-18, FAC 84-25, FAC 84-46]; Propserv, Inc., B-184698, Dec. 22, 1975, 75-2 CPD ¶ 405.

Performance evaluation reports regarding a contractor's past work on construction contracts may be requested from the appropriate contracting agency<sup>267</sup>.

Nonetheless, the primary source of information is usually the pre-award survey (PAS). The PAS is an evaluation by a surveying agency of the prospective contractor's capability to perform the proposed contract<sup>268</sup>. The "surveying agency" may be the cognizant contract administrative office or, if there is no such office, another organization designated by the agency to conduct preaward surveys<sup>269</sup>. When requesting a PAS, the CO should advise the surveying activity of any special areas of concern regarding the prospective

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<sup>267</sup> FAR 36.201 [FAC 84-12, FAC 84-53].

<sup>268</sup> FAR 9.101; FAR 9.106-1(a) [FAC 84-19]. Examples of the type of criteria that may be relevant in a PAS for hazardous waste disposal contract are found in A.F.L.C. Tailored Clause L-34, reprinted in pamphlet by AFLC/JA, U.S. AIR FORCE LOGISTICS COMMAND'S GUIDE FOR HAZARDOUS WASTE TRACKING & DISPOSAL CONTRACTING, (1990) (unpublished primer, on file with U.S.A.F. Material Command/JA, Wright-Patterson AFB OH) at Appendices B, and include:

1. technical capability,
2. production capability,
3. plant facilities & equipment,
4. financial capability,
5. purchasing & subcontracting,
6. accounting system,
7. quality assurance,
8. transportation of hazardous waste materials,
9. labor resources,
10. performance resources,
11. ability to meet delivery schedules, and
12. emergency response capabilities.

<sup>269</sup> FAR 9.101.

contractor's responsibility<sup>270</sup>. Information on the financial resources and performance capability must be updated to be as current as possible up to the date of award<sup>271</sup>.

There are monetary thresholds on the contract price that must be exceeded to justify the expense of the PAS. If the contemplated contract will be for \$25,000 or less, or will have a fixed price of less than \$100,000 and will involve commercial products, as described at FAR 11.101, the CO should not request a PAS unless circumstances justify the cost<sup>272</sup>. Before beginning a PAS, the CO must ascertain whether the prospective contractor is debarred, suspended, or otherwise ineligible, so as not to waste resources conducting a PAS on a contractor that is otherwise ineligible<sup>273</sup>. If the contractor is debarred, suspended, or otherwise ineligible, no PAS is done unless the CO specifically requests the surveying activity to do so<sup>274</sup>.

When a PAS discloses previous unsatisfactory performance, the surveying activity must specify the extent to which the prospective contractor plans, or has taken, corrective action. Lack of evidence of culpability by the

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<sup>270</sup> FAR 9.106-2: DFARS 209.106-2. See generally AFFARS 5309.106-90(a).

<sup>271</sup> FAR 9.105-1(b)(3) [FAC 84-18, FAC 84-25, FAC 84-46].

<sup>272</sup> FAR 9.106-1(a) [FAC 84-19].

<sup>273</sup> FAR 9.106-1(c) [FAC 84-19]. See infra Parts III.E.6.b & III.E.7.c.

<sup>274</sup> Id.

prospective contractor for past failure to meet contractual requirements does not necessarily indicate satisfactory performance. The narrative of the PAS must report any persistent pattern of need for costly and burdensome government assistance<sup>275</sup>. On matters of responsibility that can reasonably be corrected, such as the offeror's financial resources, the CO should solicit and consider additional information before proceeding to award<sup>276</sup>.

The CO is not bound to follow a recommendation in a PAS<sup>277</sup>. Responsibility determinations should never be based upon conclusions in the PAS that are unsupported or unreasonable<sup>278</sup>. Wrongfully denying award to an apparent awardee on the basis of a lack of responsibility where inaccurate information or misinformation in a PAS was relied upon is unreasonable<sup>279</sup>. The PAS is only a tool for the CO's use and it is never a substitute for the CO's own independent judgment and discretion.

In the sealed bids process, the contracting officer must obtain information regarding the apparent awardee's responsi-

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<sup>275</sup> FAR 9.106-4(c).

<sup>276</sup> N.G. Simonowich, B-240156, Oct. 16, 1990, 70 Comp. Gen. 28 (1990), 90-2 CPD ¶ 298; National Hazard Control Corp., B-237194, Feb. 9, 1990, 90-1 CPD ¶ 168.

<sup>277</sup> Engineered Fabrics, B-244566, Oct. 29, 1991, 91-2 CPD ¶ 392.

<sup>278</sup> Flameco Div. of Barnes Group, Inc., B-243872, Aug. 2, 1991, 91-2 CPD ¶ 123.

<sup>279</sup> Schwendener/Riteway J.V., B-250865, B-250865.2, Mar. 4, 1993, 93-1 CPD ¶ \_\_\_\_.

bility promptly after a bid opening<sup>280</sup>. In the case of negotiated proposals, responsibility is treated differently. The CO should obtain the relevant information promptly after receipt of the proposals<sup>281</sup>. In addition, the SSET's evaluation of the proposals may include responsibility related criteria designed to measure the offeror's ability and willingness to perform the contract. Evaluation of responsibility factors during the proposal evaluation does not constitute a responsibility determination, which must still be made by the CO prior to award<sup>282</sup>.

The signing of the contract by the CO constitutes an affirmative determination that the prospective contractor is responsible to perform that contract<sup>283</sup>. When an offer, on which an award would otherwise be made, is rejected because the prospective contractor is found to be nonresponsible, the CO must document the decision, and place a written determination of nonresponsibility in the contract file stating the basis of the determination<sup>284</sup>. Generally, all

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<sup>280</sup> FAR 9.105-1(b) [FAC 84-18, FAC 84-25, FAC 84-46].

<sup>281</sup> Id.

<sup>282</sup> Nash & Cibinic, supra note 182, at 547.

<sup>283</sup> FAR 9.105-2(a); MOHEAT, Inc., B-239378, May 3, 1990, 90-1 CPD ¶ 446; The Pratt & Whitney Co., Inc., Onsrud Machine Corp-Recon., B-232190, et al., Sep. 27, 1989, 89-2 CPD ¶ 275; Aesulap Instruments Corp., B-208202, Aug. 23, 1983, 83-2 CPD ¶ 228.

<sup>284</sup> FAR 9.105-2(a). If the CO determines and documents that a small business lacks responsibility, the procedures in FAR Part 19.6 must be followed, as referenced infra at Part III.A.5.

relevant evidence supporting the determination is referenced in, if not attached to, the CO's written memorandum.

All documentation supporting a determination of responsibility or nonresponsibility must be retained in the contract file<sup>285</sup>. In addition, regulations require each military department to maintain records, experience data, and files of information reflecting contractors' abilities to perform government contracts successfully for the agencies' use in subsequent procurements<sup>286</sup>. A written decision

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<sup>285</sup> FAR 9.105-2(b); FAR 4.803(a)(12 & 13) [FAC 84-5, FAC 84-42, FAC 84-60]; NAV FAR Supp. 5209.105-2; DLA FAR Supp. 9.104-1 (c)(91).

<sup>286</sup> FAR 4.803(a) [FAC 84-5, FAC 84-60]; FAR 4.802(e) [FAC 84-47, FAC 85-54, FAC 84-60]; FAR 15.612(e) [FAC 84-5, FAC 84-60, FAC 90-7]; DFARS 209.105-70(a); NAV FAR Supp. 5209.105-1(a); DLA FAR Supp. 9.106-90(b). By retaining this information in its files, the agencies are susceptible to requests for that data from the offeror's competitors under the Freedom of Information Act. Except as otherwise provided in FOIA and FAR Part 24.2, the release of preaward information is discouraged, FAR 9.105-3(a). Denying requests for the release of source selection information, which could include documents supporting a responsibility determination, is becoming increasingly controversial. Recent guidance in DOD indicates that generalizations and overly broad rules are to be avoided. Each request under FOIA must be reviewed on its own merits. The new requirement for the agencies to use past performance information as a technical criterion for all contracts over \$100,000 raises questions of whether the PPI is releasable under FOIA. See OFPP Issues Final Policy on Past Performance Information - Text of Explanatory Portion of OFPP Policy Letter 92-5, Govt. Cont. Rpts. (CCH), ¶ 99,615 (27 Jan. 1993), at 100,654. See generally 32 C.F.R. Part 286 at 55 Fed. Reg. 53104 (26 Dec. 1990), as amended at 56 Fed. Reg. 21300 (8 May 1991), and the interim rule for source selection information at 32 C.F.R. Part 286h at 55 Fed. Reg. 28614 (12 July 1990). The few cases regarding the release of PAS under FOIA requests are contrary and outdated: A.R.E. Co., Inc., B-200175, June 16, 1981, 84-1 CPD ¶ 494; Cf. Unicare Health Services, B-180262, B-180305, Apr. 5, 1974, 74-1 CPD ¶ 175. See generally Jamie S. Gorelick, Paul F. Enzinna, Restrictions on the Release of Government Information, 20 Pub. Cont. L. J.

justifying an affirmative determination of responsibility is not required by the regulation, but may be prudent where the awardee's past performance has raised some questions or concerns<sup>287</sup>.

The CO is generally granted the discretion to determine when to request a PAS. There is no requirement on the CO to request a PAS if the agency has sufficient information on hand to determine responsibility<sup>288</sup> and failure to conduct a PAS is not considered bad faith<sup>289</sup>. Also, the CO may discuss with the prospective contractor the recommendations made in the PAS, and ask the firm for a response<sup>290</sup>, but the CO is

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427 (Summer 1991); Robert B. Kelso, A Practitioner's Guide to Confidential & Financial Information & the Freedom of Information Act, 1990 The Army Lawyer 10 (DA PAM 27-50-211, July 1990); Thomas M. Susman, Risky Business: Protecting Government Information Under the Freedom of Information Act, 16 Pub. Cont. L. J. 15 (1986).

<sup>287</sup> Farnsworth Constr. Co., B-237291, Jan. 22, 1990, 69 Comp. Gen. 140 (1990), 90-1 CPD ¶ 85.

<sup>288</sup> FAR 9.106-1(a) [FAC 84-19]; McCaffery & Whitener, Inc., B-250843, Feb. 23, 1993, 93-1 CPD ¶ 168; Yellowhorse Industries, B-250282, Jan. 12, 1993, 93-1 CPD ¶ 35; Hard Bottom Inflatables, Inc., B-245961.2, Jan. 22, 1992, 92-1 CPD ¶ 103; Oliver Products Co., B-245762, B-245762.2, Apr. 28, 1992, 92-1 CPD ¶ 501; CVD Equipment Corp., B-237637, Mar. 8, 1990, 90-1 CPD ¶ 259; Kirk Bros. Mechanical Contractors, Inc., B-228603, Nov. 12, 1987, 87-2 CPD ¶ 479; Saratoga Industries, B-219341, Aug. 29, 1985, 85-2 CPD ¶ 247.

<sup>289</sup> Hard Bottom Inflatables, Inc., B-245961.2, Jan. 22, 1992, 92-1 CPD ¶ 103; Automated Data Mgmt., B-234549, Mar. 2, 1989, 89-1 CPD ¶ 229.

<sup>290</sup> FAR 9.105-3(b) [FAC 84-47, FAC 84-54].

under no obligation to engage in such discussions<sup>291</sup>. Deciding what is adequate data to support a responsibility determination is left to the CO's discretion<sup>292</sup>.

The CO's discretionary power to determine responsibility is subject to only limited review. The GAO will not review affirmative determinations of responsibility absent a showing of fraud or bad faith on the part of the procurement official, or unless the definitive responsibility criteria were misapplied<sup>293</sup>. Determinations of nonresponsibility may be

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<sup>291</sup> Harvard Interiors Mfg., Co., B-247400, May 1, 1992, 92-1 CPD ¶ 413; Theodor Arndt GmbH, B-237180, Jan. 17, 1990, 90-1 CPD ¶ 64.

<sup>292</sup> Image Industries, Inc., B-248227, July 13, 1992, 92-2 CPD ¶ 19; Compare with Data Test Corp., B-181199, Mar. 7, 1975, 54 Comp. Gen. 715 (1975), 75-1 CPD ¶ 138.

<sup>293</sup> 4 C.F.R. § 21.3(m)(5) (1991); Impact Instrumentation, Inc., B-250968, B-250968.2, Mar. 17, 1993, 93-1 CPD ¶ \_\_\_\_; McCaffery & Whitener, Inc., B-250843, Feb. 23, 1993, 93-1 CPD ¶ 168; Color Dynamics, Inc., B-250398, Jan. 22, 1993, 93-1 CPD ¶ 56; Clamshell Building Inc., B-250520, Dec. 11, 1992, 92-2 CPD ¶ 408; Image Industries, Inc., B-248227, July 13, 1992, 92-2 CPD ¶ 19; United Resin Corp., B-247292, May 18, 1992, 92-1 CPD ¶ 449; Sierra Technology & Resources Inc., B-243777, B-243777.3, May 19, 1992, 92-1 CPD ¶ 450; Blue Tee Corp., B-246623, Unpub., Mar. 18, 1992; Composite Technology, Inc., B-245783.2, Dec. 23, 1991, 91-2 CPD ¶ 579; Hartford Steam Boiler Inspection & Insurance Co., B-243981, Aug. 26, 1991, 91-2 CPD ¶ 197; Alaska Industries Resources, Inc., B-246472, Nov. 4, 1991, 91-2 CPD ¶ 427; Aydin Vector Division, B-244838, Nov. 13, 1991, 91-2 CPD ¶ 455; Formal Mgmt. Systems, Inc., B-244512, Oct. 23, 1991, 91-2 CPD ¶ 362; PTR Precision Tech, Inc., B-243439, Aug. 1, 1991, 91-2 ¶ 110; Robert Slye Electronics, Inc., B-243272, July 5, 1991, 91-2 CPD ¶ 28; Mechanical Resources, Inc., B-241403, Jan. 30, 1991, 91-1 CPD ¶ 93; Marine Transport Lines, Inc., Lant Shipping Inc., B-238223.2, B-238223.3, July 30, 1990, 90-2 CPD ¶ 80; Automatic Screw Machine Products Co., B-238583, B-238584, June 1, 1990, 90-1 CPD ¶ 519; General Electrodynamics Corp., B-238100, Apr. 17, 1990, 90-1 CPD ¶ 396; Walbar Inc., B-237228, Jan. 25, 1990, 90-1 CPD ¶ 108; Triax Pacific, Inc., B-236920, Jan. 23, 1990, 90-1 CPD ¶ 91; American Sys. Corp., B-234449, June 8,



challenged by a prospective contractor in line for award. However, the GAO's review is limited to whether the CO had a reasonable basis for the finding, or whether the agency demonstrated bad faith<sup>294</sup>. Federal courts also afford the CO's determination great discretion, limiting their review to whether the agency acted in accord with the applicable statutes and regulations, and had a rational basis for its

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1989, 89-1 CPD ¶ 537; George E. Failing Co., B-233207, Feb. 24, 1989, 89-1 CPD ¶ 203; Colt Industries, B-231213.2, Jan. 23, 1989, 89-1 CPD ¶ 49; Tek-Wave, Inc., B-228453.3, Apr. 26, 1988, 88-1 CPD ¶ 402; Bohemia, Inc.--Request for Recon., B-226659, B-226659.2, Apr. 28, 1987, 87-1 CPD ¶ 447; Keyes Fibre Company, B-225509, Apr. 7, 1987, 87-1 CPD ¶ 383; Martin Electronics, Inc., B-221298, Mar. 13, 1986, 86-1 CPD ¶ 252; Lithographics Publications, Inc., B-217263, Mar. 27, 1985, 85-1 CPD ¶ 357; Gaffny Plumbing & Heating Corp., B-206006, June 2, 1982, 82-1 CPD ¶ 521; EDMAC Assocs., Inc., B-184469, Jan. 30, 1976, 76-1 CPD ¶ 68; Comp. Gen. Dec. B-179478, 53 Comp. Gen. 443 (Dec. 28, 1973); Comp. Gen. Dec. B-135718, 37 Comp. Gen. 798 (May 28, 1958).

<sup>294</sup> 4 C.F.R. § 21.3(m)(5) (1991); Ingenieria Y Construcciones, S.A., B-241043, Dec. 28, 1990, 90-2 CPD ¶ 524; MCI Constructors, Inc., B-240655, Nov. 27, 1990, 90-2 CPD ¶ 431; Campbell Industries, B-238871, July 3, 1990, 90-2 CPD ¶ 5; Southern California Engineering Co., B-238010, B-238010.2, Apr. 5, 1990, 69 Comp. Gen. 387 (1990), 90-1 CPD ¶ 365; Garten-und Landschaftbau GmbH Frank Mohr, B-237277, B-237276, Feb. 13, 1990, 90-1 CPD ¶ 186; Seaworks, Inc., B-226631, Mar. 2, 1987, 87-1 CPD ¶ 235; Becker & Schwindenhammer, GmbH, B-225396, Mar. 2, 1987, 87-1 CPD ¶ 235; T & A Painting, Inc., B-224222, Jan. 23, 1987, 87-1 CPD ¶ 86; The Aeronetics Division of AAR, Brooks & Perkins, B-222791, B-222516, Aug. 5, 1986, 86-2 CPD ¶ 151; Martin Widerker, Eng'r., B-219872, et al., Nov. 20, 1985, 85-2 CPD ¶ 571; Products Research & Chemical Corp., B-214293, July 30, 1984, 84-2 CPD ¶ 122; S.A.F.E. Export Corp., B-208744, Apr. 22, 1983, 83-1 CPD ¶ 437, aff'd B-208744.2, July 14, 1983, 83-2 CPD ¶ 90; AMCO Tool & Die, Co., B-207191, Feb. 28, 1983, 62 Comp. Gen. 213 (1983), 83-1 CPD ¶ 246.

decision<sup>295</sup>.

Responsibility determinations made by other agencies or other COs in the same agency are not binding on a contract officer. Each CO must make an independent determination based upon the facts and circumstances of that particular procurement at the time of award. The decisions are inherently judgmental, and the CO may reach different conclusions as to a firm's responsibility<sup>296</sup>.

Regardless of the source, previous responsibility determinations on a prospective awardee are of marginal value, as they may become outdated relatively quickly. The CO should always investigate the accuracy of the PAS<sup>297</sup>, and whether corrective action has recently resolved the offeror's poor performance problems<sup>298</sup>. On the other hand, a contractor's recent problems in performing may counter a previously good

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<sup>295</sup> GEO-CON, Inc. v. United States, 783 F. Supp. 1 (D.C. Cir. 1992); Cubic Corp. v. Cheney, Unpub. (U.S. District Court D. C. No. 89-1617, Aug. 7, 1989) available on WESTALW, Government contracts library, Federal Court file; Delta Data System Corp. v. Webster, 744 F.2d 197 (D.C. Cir. 1984); Kentron Hawaii, Ltd. v. Warner, 480 F.2d 1166 (D.C. Cir. 1973).

<sup>296</sup> The Aeronetics Div. of AAR Brooks & Perkins, B-222791, B-222516, Aug. 5, 1986, 86-2 CPD ¶ 151; NJCT Corp., B-219434, Sep. 26, 1985, 64 Comp. Gen. 883 (1985), 85-2 CPD ¶ 342; Products Research & Chemical Corp., B-214293, July 30, 1984, 84-2 CPD ¶ 122.

<sup>297</sup> Schwendener/Riteway J.V., B-250865, B-250865.2, Mar. 4, 1993, 93-1 CPD ¶ \_\_\_\_.

<sup>298</sup> Holmes & Narver, B-239469.4, B-239469.5, Jan. 17, 1991, 91-1 CPD ¶ 51; United Machines, B-187193, Mar. 16, 1977, 56 Comp. Gen. 411 (1977), 77-1 CPD ¶ 195; D. Moody, Astronautics Corp. of America, B-180732, B-181971, B-182091, July 1, 1975, 55 Comp. Gen. 1 (1975), 75-2 CPD ¶ 1.

performance record. In each and every case, the ultimate question asked by the CO should be: "Based upon the facts and circumstances existing at the time of award, does the prospective awardee have the present capability and willingness to perform the duties required by the contract?"<sup>299</sup>.

#### D. RESPONSIVENESS OF THE BID

Responsibility, which is discussed in greater detail infra at Part III.E., is often confused with the issue of responsiveness. Responsiveness pertains only to sealed bids and is determined at the time the sealed bids are opened<sup>300</sup>. It concerns whether a bidder has unequivocally offered, at bid submission, to provide supplies in conformity with all the material terms and conditions of a solicitation for sealed bids<sup>301</sup>. The distinction is whether or not the bidder will

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<sup>299</sup> Cibinic, supra note 229, at 21.

<sup>300</sup> T & T Products, Inc., B-243895, Aug. 7, 1991, 91-2 CPD ¶ 139; VTEC Laboratories, Inc., B-245481, Dec. 26, 1991, 91-2 CPD ¶ 581; Associated Mechanical, Inc., B-243892, Aug. 23, 1991, 91-1 CPD ¶ 192; M/RAD Corp., B-248146, July 29, 1992, 92-1 CPD ¶ 61; Lift Power, Inc., B-182604, Jan. 10, 1975, 75-1 CPD ¶ 13.

<sup>301</sup> NR Vessel Corp., B-250925, Unpub., Feb. 11, 1993, available on WESTLAW, Government contracts library, Comp. Gen. file; Honey Inc. v. United States, 16 Cl. Ct. 173 (1989), rev'd on other grounds, 870 F. 2d 644 (Fed. Cir. 1989); Southwest Marine, Inc., B-247639, May 12, 1992, 92-1 CPD ¶ 442; Bishop Contractors, Inc., B-246526, Dec. 17, 1991, 91-2 CPD ¶ 555; Wright Assocs., Inc., B-238656, June 12, 1990, 90-1 CPD ¶ 549; Pierpoint, Inc., B-219855, Oct. 10, 1985, 85-2 CPD ¶ 401; EPCON Industrial System, Inc., B-216725, Dec. 27, 1984,

conform to the IFB, as opposed to how the bidder will accomplish conformance<sup>302</sup>. A bid that does not conform to the solicitation in a material way cannot be corrected or modified, and must be rejected<sup>303</sup>. Therefore, whether the bidder is responsible or not is irrelevant, if the bid is not responsive to the government needs<sup>304</sup>.

An example of where an environmentally-based IFB requirement that was treated as a responsiveness issue is Aqua-Tech, Inc. v. U.S. Army Corps of Engineers<sup>305</sup>. The Corps issued an IFB for removal of toxic wastes, including PCBs, from a facility in Ohio. The IFB required that the waste materials containing PCBs with a concentration in excess of 500 ppm be disposed of in an incinerator that was in compliance with EPA regulations. In addition, each bidder was required to identify the facility to which it intended to transport the wastes, to submit a letter of commitment from

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85-1 CPD ¶ 2.

<sup>302</sup> Essex Electro Engineers, Inc. v. United States, 3 Cl. Ct. 277, 283 n. 8 (1983); Skyline Credit Corp., B-209193, Mar. 15, 1983, 83-1 CPD ¶ 257; Propper Manufacturing Co., B-206193.3, Mar. 22, 1982, 82-1 CPD ¶ 269.

<sup>303</sup> FAR 14.301; Blount, Inc. v. United States, 22 Cl. Ct. 221 (1990); For a dated, but still informative, review of the distinction between responsiveness and responsibility see Alfred A. Grey, Responsiveness Versus Responsibility: Policy & Practice in Government Contracts, 7 Pub. Cont. L. J. 48 (October 1974).

<sup>304</sup> Responsiveness is not an issue in negotiated acquisitions because material defects in an initial proposal responding to a RFP can be cured prior to the call for best and final offers (BAFOs). FAR Subpart 15.1.

<sup>305</sup> 564 F. Supp. 773(D.D.C. 1983).

that facility agreeing to accept the proposed quantities and types of toxins, and to submit certification from the facility that it had all the requisite permits for incineration of waste that contained PCBs in amounts greater than 500 ppm. Aqua-Tech submitted the low-priced bid, but did not submit the disposal facilities' certification with its bid. The contracting agency found Aqua-Tech nonresponsive and denied it award. Aqua-Tech argued that the certification submission went to the issue of responsibility, and could therefore be submitted anytime after bid opening and before award. The Federal District Court disagreed, holding that the failure to submit the certification with the bid rendered the bid nonresponsive. The Court appeared to rely, in part, on the agency's rationale that public safety and welfare were protected by the direct and prompt disposal of the toxic wastes. The IFB specifications requiring submission of the disposal facility certification were not technicalities, said the court, but were designed to avoid risks in the cleanup effort<sup>306</sup>.

#### E. GENERAL STANDARDS OF RESPONSIBILITY

As already referenced above<sup>307</sup>, the FAR lists specific standards that every prospective contractor must meet to be

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<sup>306</sup> Id. at 780.

<sup>307</sup> See generally infra at Part III.A.2 and accompanying text.

eligible for award. In the acquisition regulation, the elements of responsibility are neatly separated into individual factors. As seen in the following GAO decisions the elements often interrelate, blurring the distinction between them. In certain cases, various elements of responsibility are reflections of some common underlying problem with the prospective contractor's management or workmanship.

## 1. FINANCIAL RESOURCES

### a. INTRODUCTION TO FINANCIAL CAPABILITY.

In order to be found responsible a firm must, among other things, affirmatively demonstrate that it has, or can obtain, sufficient financial resources to perform the contract<sup>308</sup>. Financial resources are one of the most critical prognosticators for success. While money does not guarantee a successful contractual performance, the lack of adequate funds will all but assure failure<sup>309</sup>.

Consideration of specific financial qualifications is part of the responsibility determination and, therefore, falls

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<sup>308</sup> FAR 9.104-1(a) [FAC 84-18, FAC 90-8]; FAR 9.104-3(b) [FAC 84-38, FAC 90-8].

<sup>309</sup> It has been estimated that two thirds of DOD terminations for default are due to financial inability. James F. Nagel, Financial Inability in Government Contracts, 17 Pub. Cont. L. J. 320, 321 & 343 (1987).

within the CO's discretion and business judgment<sup>310</sup>. Not only is having sufficient assets relevant, but failure to pay just debts also indicates a lack of responsibility<sup>311</sup>, as does a lack of credit<sup>312</sup>.

The contracting officer may take an in-depth look into a prospective contractor's fiscal health to render an informed determination<sup>313</sup>. In some cases, the financial problems are obvious. In the GAO decision of Capital Contractors, Inc. & Baker Roofing Co.<sup>314</sup>, the CO's decision to find the offeror financially nonresponsible was upheld where the decision was based on the documented past practice of the offeror's tardy payment to its suppliers, a five year history of heavy debt burden, and an ongoing serious cash flow problem. The financial problems may be more subtle in other cases<sup>315</sup>.

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<sup>310</sup> Facilities Mgmt., Inc., B-247698.2, Apr. 24, 1992, 92-1 CPD ¶ 394; Nova International Inc., B-227696, Sep. 21, 1987, 87-1 CPD ¶ 284; Comp. Gen. Dec. B-176466, 52 Comp. Gen. 372 (Dec. 20, 1972).

<sup>311</sup> DLA FAR Supp. 9.106-2(90)(a).

<sup>312</sup> James London & Assocs., B-190688, Dec. 23, 1977, 77-2 CPD ¶ 502.

<sup>313</sup> Formal Management. Systems, Inc., B-244512, Oct. 23, 1991, 91-2 CPD ¶ 362, n. 1; Construcciones Electromecanicas, S.A., B-242656, B-242659, May 8, 1991, 91-1 CPD ¶ 448; Reel-O-Matic Systems, Inc. v. United States, 16 Cl. Ct. 93 (1989).

<sup>314</sup> B-248944, B-248944.2, Oct. 22, 1992, 92-2 CPD ¶ 267.

<sup>315</sup> In Betakut USA, Inc., B-234282, May 8, 1989, 89-1 CPD ¶ 432, the GAO upheld the CO's finding that the contractor lacked the financial resources to be considered responsible. The CO had cited the prospective contractor's negative net worth, weak asset base, and low net income. In Republic Environmental Systems, Inc., B-249898, Dec. 15, 1992, 92-2 CPD ¶ 417, a PAS revealed that the offeror was unable to secure a

Where concerns are raised regarding the apparent awardee's financial capability, the contractor should be allowed to obtain the requisite financial backing, provided it does not interfere with the award and performance of the contract<sup>316</sup>.

**b. BANKRUPTCY.**

Bankruptcy may be a good indicator that a prospective offeror is having financial problems. Nevertheless, filing for bankruptcy does not require a finding of nonresponsibility. Therefore, a contracting agency cannot base its nonresponsibility determination solely on the offeror's petition for bankruptcy<sup>317</sup>. Likewise, the bankruptcy of a prospective contractor's subcontractor does not mandate a finding of nonresponsibility of the prime<sup>318</sup>.

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loan from banks. Without a working capital loan sufficient to finance the proposed contract, the offeror was properly determined nonresponsible.

<sup>316</sup> Saco Defense, Inc., B-240603, B-240891, Dec. 6, 1990, 90-2 CPD ¶ 462.

<sup>317</sup> 11 U.S.C. § 525 (1984); FHC Options, Inc., B-246793.2, Apr. 14, 1992, 92-1 CPD ¶ 366, n. 2; Lucas Place, Ltd., B-238008, B-238008.2, Apr. 18, 1990 ¶ 398; Johnny F. Truck & Dragline Service, Inc., B-236984, Jan. 2, 1990, 90-1 CPD ¶ 4; Hugo's Cleaning Service, Inc., B-228396.4, July 27, 1988, 88-2 CPD ¶ 89; C. Martin Co., B-228552, Jan. 20, 1988, 88-1 CPD ¶ 56; Domar Industries Co., Inc., B-202735, Sep. 4, 1981, 81-2 CPD ¶ 199; Hunter Outdoor Products, Inc., B-179922, Oct. 16, 1974, 54 Comp. Gen. 276 (1974), 74-2 CPD ¶ 207; Schnitzer, *supra* note 174, at 16-6.

<sup>318</sup> Telelink Research, Inc., B-247052, Apr. 28, 1992, 92-1 CPD ¶ 400; Sam Gonzales, Inc.--Recon., B-225542.2, Mar. 18, 1987, 87-1 CPD ¶ 306.



The contracting officer must consider the circumstances of the bankruptcy in terms of whether the contractor has the present ability to perform the contract<sup>319</sup>. A nonresponsibility determination may be warranted where the contractor had taken no action to correct its financial problems and bankruptcy<sup>320</sup>. On the other hand, the contracting officer may consider the efforts of the contractor on its most recent performance to find the contractor to be responsible<sup>321</sup>.

One of the more common ways to attempt to remedy any financial concerns is to secure financial assistance through association with another firm<sup>322</sup>. The contracting agency

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<sup>319</sup> Harvard Interiors Mfg., Co., B-247400, May 1, 1992, 92-1 CPD ¶ 423; Sam Gonzales, Inc., --Recon., B-225542.2, Mar. 18, 1987, 87-1 CPD ¶ 306.

<sup>320</sup> Id.

<sup>321</sup> In the GAO decision Hugo's Cleaning Svc., Inc.--Recon., B-228396, B-228396.6, Oct. 20, 1988, 88-2 CPD ¶ 376, the CO found the prospective awardee was responsible despite the fact the firm filed for bankruptcy at the same time it submitted its bid. The CO found a letter of commitment for \$800,000 from a financial institution to fund the awardee's performance on the pending contract persuasive. The GAO's denial of an unsuccessful bidder's protest clearly infers that, but for the letter of credit, the awardee should have been determined nonresponsive. Under similar circumstances in Johnny F. Smith Truck & Dragline Service, Inc., B-236984, Jan. 2, 1990, 90-1 CPD ¶ 4, the GAO upheld the decision finding the prospective awardee responsible where the CO took into consideration the fact that the bankruptcy court ordered payments under the pending contract to be segregated and that suppliers and subcontractors for the work under the pending contract would have priority over other claimants to the proceeds from the contract.

<sup>322</sup> Farnsworth Constr. Co., B-237291, Jan. 22, 1990, 69 Comp. Gen. 140 (1990), 90-1 CPD ¶ 85.

must look to the circumstances of the proposed association in determining whether the prospective contractor will have the requisite fiscal viability<sup>323</sup>. If the CO is satisfied that the associated firm has committed itself to pledge its assets for the prospective contractor's use and there is no problem with the anti-assignment prohibitions<sup>324</sup>, the CO may accept the arrangement<sup>325</sup>.

### c. SURETIES.

In some procurements, the bidders/offerors may be required to submit bonds to guarantee their bid, their performance, or payment of the subcontractors<sup>326</sup>. The purpose of the bond in these cases is to secure the liability of the surety to the government, in the event the bidder fails

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<sup>323</sup> Telex Communications, Inc.; Mil-Tech Systems, Inc., B-212385, B-212385.2, Jan. 30, 1984, 84-1 CPD ¶ 127; Comp. Gen. Dec. B-188743, 57 Comp. Gen. 67 (Nov. 7, 1977); Comp. Gen. Dec. B-179026, 53 Comp. Gen. 496 (Jan. 25, 1974).

<sup>324</sup> FAR 32.802; FAR 32.804; FAR 42.1204; FAR 52.232-23; DFARS 252.217-7107; DFARS 217.7104(a). See also Ionics, Inc., B-211180, Mar. 13, 1984, 84-1 CPD ¶ 290; Telex Communications, Inc.; Mil-Tech, Inc., B-212385, B-212385.2, Jan. 30, 1984, 84-1 CPD ¶ 127.

<sup>325</sup> FAR Subpart 32.8. The transfer or assignment of any claim for payment against the U.S. Government or an interest in the claim, or the authorization to receive payment for any part of the claim, is subject to the CO's approval of a formal written assignment submitted by the contractor. 31 U.S.C. § 3727, as amended (1986); 41 U.S.C. § 15 (1970); United California Discount Corp. v. United States, 12 Cl. Ct. 504 (1990).

<sup>326</sup> FAR 28.101-1 [FAC 84-12, FAC 84-26, FAC 84-29, FAC 84-51]; FAR 28.102-1.

to fulfill its contractual obligations<sup>327</sup>. Usually, performance and payment bonds are used on construction contracts, although there can be circumstances in which bonds may be required for nonconstruction contracts in order to protect the government's interest<sup>328</sup>.

There are two types of sureties that are relevant to Federal contracts. Corporate sureties are entities that are licensed under the various insurance laws and, under their charters, have the legal power to pledge their assets against the occasion that the prime contractor will not fulfill its contractual duties<sup>329</sup>. They are reviewed by the Treasury Department, and approved sureties are listed in the annual "List Of Acceptable Sureties"<sup>330</sup>. The CO must review the list to verify that the proposed corporate surety is acceptable. A corporate surety must be listed in this

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<sup>327</sup> FAR 28.001; No Slot Pest Control, Inc., B-234290, Apr. 20, 1989, 68 Comp. Gen. 396 (1989), 89-1 CPD ¶ 396; Transcontinental Enterprises, Inc., B-225802, July 2, 1987, 66 Comp. Gen. 549 (1987), 87-2 CPD ¶ 3. See Andrew W. Stephenson, Douglas L. Patin, et al., Surety's Role in Default Terminations, 90-4 Construction Briefing 1 (Mar. 1990).

<sup>328</sup> FAR 28.102-1(a); FAR 28.103-2(a); Certified Investigations, B-248912, Sep. 28, 1992, 92-2 CPD ¶ 224; Remtech, Inc., B-240402.5, Jan. 4, 1991, 91-1 CPD ¶ 35; IBI Security, Inc., B-235857, Sep. 27, 1989, 89-2 CPD ¶ 277; Professional Window & Cleaning, Inc., B-224187, Jan. 23, 1987, 87-1 CPD ¶ 87. See infra Part II.B.

<sup>329</sup> FAR 28.001.

<sup>330</sup> FAR 28.202(d) [FAC 84-53]; TREASURY DEPARTMENT CIRCULAR 570.

Treasury Circular 570 to be acceptable<sup>331</sup>. A surety so listed remains acceptable until the Treasury Department notifies COs to the contrary<sup>332</sup>.

The other type of surety that is acceptable on Federal contracts is an individual who accepts liability for the entire penal amount of the bond<sup>333</sup>. Acceptability of an individual surety poses a challenge different from the corporate surety. No master list exists for individuals offering to serve as surety on Federal contracts; therefore, the CO is obliged to affirmatively determine the acceptability of individuals proposed as sureties, and must ensure that the surety's pledged assets are sufficient to cover the bond obligation<sup>334</sup>. The CO may investigate the surety in depth. When doubts are raised about the surety, the offeror should be allowed a reasonable time to substitute an acceptable surety<sup>335</sup>. If the CO determines that none of the individual sureties offered are acceptable, the offeror utilizing those sureties will be rejected as nonresponsive<sup>336</sup>.

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<sup>331</sup> FAR 28.202(a)(1) [FAC 84-53]. A bid accompanied by a bond executed by a corporate surety & not listed in the Treasury Circular 570 is nonresponsive and rejected without the opportunity to cure the defect. Envirotox Technologies, Inc., B-250091, Sep. 17, 1992, 92-2 CPD ¶ 186.

<sup>332</sup> FAR 28.202(c) [FAC 84-53].

<sup>333</sup> FAR 28.001.

<sup>334</sup> FAR 28.203(a) [FAC 84-53].

<sup>335</sup> FAR 28.203(d) [FAC 84-53].

<sup>336</sup> FAR 28.203(c) [FAC 84-53]; except for those sureties rejected as nonresponsive under FAR 28.101-4.

Some aspects of the sureties concern responsiveness, not responsibility. For instance, failure to submit the bid guarantee or bond renders a bid nonresponsive<sup>337</sup>. Corporate or individual bonds that are defective or irregular on their face bonds are usually rejected by the contract officer as nonresponsive to the solicitation, because they raise doubt as to the surety's intent to be bound and to the enforceability of the bond itself<sup>338</sup>. Whether a surety is clearly bound by the terms of the bid bond is a question of responsiveness to be determined from an examination of the face of the bond<sup>339</sup>. Questions regarding the legitimacy of the surety's signatures on the bond goes to the enforceability of the bond, and is therefore an example of the responsiveness issue<sup>340</sup>. Irregularities of a bond that result in rejection of the bid as nonresponsive preempt a responsibility determination.

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<sup>337</sup> Interkon Corp., B-250125, Dec. 15, 1992, 92-2 CPD ¶ 418; Kenard Construction Co., Inc., B-248830, Sep. 25, 1992, 92-2 CPD ¶ 207.

<sup>338</sup> FAR 28.101-4(c) [FAC 84-53]; FAR 14.404-2 [FAC 84-12, FAC 84-58, FAC 84-60, FAC 90-5]; DFARS 252.228-7007; Grafton McClintock, Inc., B-241581.2, Apr. 17, 1991, 91-1 CPD ¶ 381; Joseph B. Fay Co., B-241769.2, Mar. 1, 1991, 91-1 CPD ¶ 234; National Hazardous Control Corp., B-237194, Feb. 9, 1990, 90-1 CPD ¶ 168; Kirila Contractors, Inc., B-230731, June 10, 1988, 67 Comp. Gen. 455 (1988), 88-1 CPD ¶ 554; Fitzgerald & Co.--Recon., B-223594.2, Nov. 3, 1986, 86-2 CPD ¶ 510; A & A Roofing Company, Inc., B-219645, Oct. 25, 1985, 85-2 CPD ¶ 463; J.W. Bateson Co., Inc., B-189848, Dec. 16, 1977, 77-2 CPD ¶ 472.

<sup>339</sup> Transcontinental Enterprises, Inc., B-225802, July 1, 1987, 66 Comp. Gen. 549 (1987), 87-2 CPD ¶ 3.

<sup>340</sup> Darla Environmental, Inc., B-234560, May 12, 1989, 89-1 CPD ¶ 454.

Other issues concerning the surety do go to the responsibility of the contractor. Net worth of the individual surety and the extent of the individual surety's current bond obligations are two such issues. Each bond is accompanied by additional documentation, usually on a Standard Form 28, on which the surety lists its assets, debts, and other bond obligations, certification of title, and pledge of assets<sup>341</sup>. The sole purpose of these documents is to assist the CO in determining the responsibility of the individual surety<sup>342</sup>. The accuracy of the supportive documentation is a matter of responsibility and defects on these documents may be fixed anytime prior to award<sup>343</sup>. Submission of fraudulent, duplicitous information in the Standard Form 28, raising questions of the surety's integrity and credibility, will render the individual surety nonresponsible and the bid itself

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<sup>341</sup> FAR 28.203(b) [FAC 84-53].

<sup>342</sup> North American Construction Corp.--Request for Recon., B-236672.2, Sep. 21, 1989, 89-2 CPD ¶ 264.

<sup>343</sup> FAR 28.203(d) [FAC 84-53]; Gene Quigley Jr., B-241565, Feb. 19, 1991, 70 Comp. Gen. 274 (1991), 91-1 CPD ¶ 182; Burtch Constr., B-240695, B-240696, Nov. 23, 1990, 90-2 CPD ¶ 423; Norse Inc., B-233534, Mar. 22, 1989, 89-1 CPD ¶ 293; Cascade Leasing, Inc., B-231848.2, Jan. 10, 1989, 89-1 CPD ¶ 20; E.C. Development, Inc., B-231523, Sep. 26, 1988, 88-2 CPD ¶ 285; Transcontinental Enterprises, B-225802, July 1, 1987, 66 Comp. Gen. 549 (1987), 87-2 CPD ¶ 3; Singleton Contracting Corp., B-216536, May 27, 1985, 85-1 CPD ¶ 355; Hispanic Maintenance Svcs., B-218199, Apr. 22, 1985, 85-1 CPD ¶ 461; United Food Services, Inc., B-214098.2, Sep. 18, 1984, 84-2 CPD ¶ 312; Clear Thru Maintenance, Inc., B-203608, June 15, 1982, 61 Comp. Gen. 456 (1982), 82-1 CPD ¶ 581; Bruno-NY Industries, B-196185, June 5, 1980, 59 Comp. Gen. 512 (1980), 80-1 CPD ¶ 388; T & A, Inc., B-224222, Jan. 23, 1978, 78-1 CPD ¶ 86.

unacceptable<sup>344</sup>. The surety's ability to demonstrate ownership of the assets listed is always relevant<sup>345</sup>. Therefore, the supporting data is fair game for the CO to investigate and evaluate as part of the responsibility determination.

Since questions regarding individual surety's acceptability go to the responsibility of the prospective contractor, the contracting agency must make an investigation where questions of accuracy are raised<sup>346</sup>. The CO is not limited to consideration of the information provided by the contractor's surety and may request additional information from other sources where necessary<sup>347</sup>. The contractor and the surety may be encouraged to submit additional evidence to resolve the questions raised<sup>348</sup>. In fact, since the burden of proof is on the offeror/bidder, the surety should be

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<sup>344</sup> General Services Administration--Recon., B-23468.2, Mar. 23, 1990, 69 Comp. Gen. 345 (1990), 90-1 CPD ¶ 321; Farinha Enterprises, Inc., B-235474, Sep. 6, 1989, 68 Comp. Gen. 666 (1989), 90-1 CPD ¶ 262; Allied Production Mgmt. Co., Inc., B-237126, B-237134, B-237370, Dec. 22, 1989, 89-2 CPD ¶ 587; Hirt Company, B-230864, June 23, 1988, 88-1 CPD ¶ 605. Issues of credibility of the data submitted in the Standard Form 28, as indicated by gross inconsistencies, procedural discrepancies, and gross errors, are relevant to the CO's inquiry.

<sup>345</sup> FAR 28.203-2(c)(iii) [FAC 84-53]; National Hazard Control Corp., B-237194, Feb. 9, 1990, 90-1 CPD ¶ 168.

<sup>346</sup> FAR 28.203(a) [FAC 84-53].

<sup>347</sup> FAR 28.203(e) & (f) [FAC 84-53]; Transcontinental Enterprises, B-225802, July 1, 1987, 66 Comp. Gen. 549 (1987), 87-2 CPD ¶ 3.

<sup>348</sup> FAR 28.203(d) [FAC 84-53].

encouraged to provide sufficient data to establish its own responsibility<sup>349</sup>. A prospective contractor may have the opportunity to bolster its surety's acceptability<sup>350</sup>. But the CO need not delay award to provide the opportunity to demonstrate the individual surety's responsibility<sup>351</sup>. As is the case with other issues of responsibility, the adequacy of the surety's net worth may be established anytime prior to contract award<sup>352</sup>. The bottom line on this issue is: a prospective contractor that cannot or does not provide acceptable sureties, where they are required by the contract, is nonresponsible<sup>353</sup>. The CO is granted broad discretion by GAO in making the determination of surety responsibility<sup>354</sup>.

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<sup>349</sup> Southern California Engineering Co., Inc., B-238010, B-238010.2, Apr. 5, 1990, 90-1 CPD ¶ 365; Hirt Co., B-230864, June 23, 1988, 88-1 CPD ¶ 605; Manufacturing Systems International, B-212173, May 30, 1984, 84-1 CPD ¶ 586.

<sup>350</sup> Astro Painting Co., B-247992, B-247992.2, June 19, 1992, 92-1 CPD ¶ 535; Pamfilis Painting, Inc., B-247922, June 15, 1992, 92-1 CPD ¶ 521.

<sup>351</sup> Hewlett-Packard Co., Medical Products Corp., B-216125.2, May 24, 1985, 85-1 CPD ¶ 597.

<sup>352</sup> Clear Thru Maintenance, Inc., B-203608, June 15, 1982, 61 Comp. Gen. 456 (1982), 82-1 CPD ¶ 581.

<sup>353</sup> Astro Painting Co., B-247922, B-247922.2, June 19, 1992, 92-1 CPD ¶ 535; Gene Quigley, Jr., B-241565, Feb. 19, 1991, 70 Comp. Gen. 274 (1991), 91-1 CPD ¶ 182; U.S. Floors, Inc., B-241552, B-241555, Feb. 6, 1991, 91-1 CPD ¶ 130; Peter Vicari General Contractor, Inc.--Request for Recon., B-236927, B-236927.2, Apr. 25, 1990, 90-1 CPD ¶ 419; CRM Inc., B-236251, Nov. 17, 1989, 89-2 CPD ¶ 471; Construct Sun, Inc., B-234068, May 8, 1989, 89-1 CPD ¶ 431.

<sup>354</sup> Triax Pacific, Inc. B-236920, Jan. 23, 1990, 90-1 CPD ¶ 91; C.F. Wyllie Constr. Co., B-234123, Apr. 25, 1989, 68 Comp. Gen. 408 (1989), 89-1 CPD ¶ 406.



The two most common challenges to a surety are the integrity of the individual surety and adequacy of assets pledged by the surety. The two issues are interrelated and often merged by the GAO. Integrity issues may be raised by an investigation into the surety's business practices that casts doubt on the surety's honesty<sup>355</sup>. Nonresponsibility of an individual surety may be proper where the surety was under investigation for financial mismanagement and integrity violations on a government contract<sup>356</sup>. However, a contracting officer may reject a prospective awardee as nonresponsible without further inquiries for having unacceptable sureties where there is doubt as to the integrity of the sureties and the credibility of their representations<sup>357</sup>. In the GAO decision S & A Construction Company, Inc., the surety was rejected when the CO determined that the surety had made false statements regarding the value of the assets and the size of the surety's debt<sup>358</sup>. Whenever evidence of criminal or fraudulent activities by an individual surety arise, the matter must be referred to the appropriate

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<sup>355</sup> Seaworks, Inc., B-226631, B-226631.2, Dec. 22, 1989, 89-2 CPD ¶ 581; Surface Preparation & Coating Enterprises, Inc., B-235170, July 20, 1989, 89-2 CPD ¶ 69.

<sup>356</sup> Seaworks, Inc., B-226631, B-226631.2, Dec. 22, 1989, 89-2 CPD ¶ 581.

<sup>357</sup> Santurce Constr. Corp., B-240728, Dec. 10, 1990, 70 Comp. Gen. 133 (1990), 90-2 CPD ¶ 469; Seaworks, Inc., B-226631, B-226631.2, Dec. 22, 1989, 89-2 CPD ¶ 581.

<sup>358</sup> B-235490.2, Aug. 9, 1989, 89-2 CPD ¶ 119.

agency official in accordance with agency procedures<sup>359</sup>.

A challenge to the adequacy of the surety's assets includes concerns over the accuracy of the data submitted and the valuation of the assets pledged. A surety has an obligation to disclose all outstanding bond obligations<sup>360</sup>. Failure to do so prevents the CO from making an informed determination of the surety's financial soundness<sup>361</sup>. If the contracting officer cannot verify the financial resources of each surety and doubt is cast on the sureties' worth, the CO is obliged to find the prospective contractor nonresponsible<sup>362</sup>. Once challenged, the burden is on the prospective contractor to prove the surety's financial assets are adequate for the contract in issue<sup>363</sup>. Another problem with the adequacy of the assets pledged arises when the surety overvalues its assets, thereby leaving the government exposed

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<sup>359</sup> FAR 28.203(g) [FAC 84-53].

<sup>360</sup> The Federal Government does not have a system to verify the data submitted by the surety regarding the surety's outstanding bond obligations. The CO has an obligation to check the data in the course of the responsibility determination. The most probable method is for the CO staff to call and verify the obligations listed by the surety. This does help where the surety declined to make full disclosure.

<sup>361</sup> Ignacio Sanchez Construction, B-237039, Dec. 20, 1989, 89-2 CPD ¶ 575; Satellite Services, Inc., B-220071, Nov. 8, 1985, 85-2 CPD ¶ 532.

<sup>362</sup> Labco Construction, Inc., B-232988, B-232987, B-232986, Feb. 9, 1989, 89-1 CPD ¶ 135.

<sup>363</sup> Id.

to pecuniary risk if the contractor fails in its duties<sup>364</sup>.

d. SURETIES IN ENVIRONMENTAL CONTRACTS.

Provisions were made in the SARA amendments and the 1992 Defense Authorization Act to limit the potential liability of sureties pledging for DERP contractors<sup>365</sup>. Despite these provisions, the availability of sureties is becoming an issue of increasing importance in the environmental acquisition process. Industry has complained that the small number of acceptable sureties may impair the government's ability to procure environmental services in the future. At a hearing on 19 September 1990, environmentalists, Superfund cleanup contractors, representatives of the union workers engaged in Superfund cleanups, and representatives of the insurance industry testified before the Committee on Environment & Public Works that the unavailability of required surety bonds for Superfund cleanup projects was reducing competition for

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<sup>364</sup> An example of a contractor being rejected as nonresponsible for overvaluing its assets to the potential detriment of the Government is Cascade Leasing, Inc., B-231848.2, Jan. 10, 1989, 89-1 CPD ¶ 20. See also Aceves Construction & Maintenance, B-233027, Jan. 4, 1989, 89-1 CPD ¶ 7.

<sup>365</sup> SARA § 211(a)(1)(B), 10 U.S.C. § 2701(i)(3) (1986), limits the obligation of performance bond sureties in the event of default by the DERP contractor to the cost of completion of the project. The surety will not be liable on bonds to indemnify or compensate the obligee for loss or liability arising from personal injury or property damage whether or not caused by a breach of the bonded contractor. See § 336 of the 1992 Defense Authorization Act and DAC 91-31. See infra at fn. 366.

these projects, potentially driving up costs<sup>366</sup>.

The Environmental Protection Agency and the U.S. Corps of Engineers have experienced difficulties in contracting for hazardous and toxic waste (HTW) cleanup projects due to the industry's complaints that it could not obtain surety bonds required as a prerequisite for such remedial action projects<sup>367</sup>. The bonds in issue were to guarantee the surety will either complete the performance or pay the Government the costs associated with completing the project to the limit of the penal amount in the bond. These complaints led COE to conduct a study of the problem. The COE study concluded that, in an effort to minimize their risk liability, the surety industry was reluctant to provide performance bonds to HTW contractors that had other substantial business with the surety, or major financial assets available, and had a history of past performance problems on HTW projects. The EPA concurred with the COE that qualified existing firms were being denied bonding and that new firms had fewer opportunities to break into the market due to the

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<sup>366</sup> SENATE REPORT 101-520, Calendar No. 960, to accompany S. 3187, Environmental Cleanup Activities. Similar comments were made by industry representatives during hearings before the House Armed Services Committee panel in March 1992. Proposals were made that DOD should adopt a negligence standard rather than a strict liability standard. The proposal met with mixed reviews within the panel. Federal Facilities: Contractors Say They Need To Be Indemnified Against Risks of Cleaning Up Defense Facilities, 22 Env'tl. Rptr. (BNA) 2520 (Mar. 13, 1992).

<sup>367</sup> U.S. ARMY CORPS OF ENGINEERS, Institute for Water Resources Report, (90-R-1 July 1990) reported in Govt. Cont. Rpt. (CCH) ¶ 99,341 (May 15, 1991).

unavailability of the bonding<sup>368</sup>.

An interim rule was published by the DOD in September 1992 outlining the limits of the proposed amendment to the DFARS 228.102-1<sup>369</sup>. In light of this problem, there is little a contracting agency can do to resolve the availability of bonds for environmental contracts except, perhaps, review the solicitation to guarantee that the bonding requirements are realistic and not unduly burdensome. Long term resolution must await legislative action on indemnification and liability<sup>370</sup>.

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<sup>368</sup> Id.

<sup>369</sup> The amended DFARS clause provides that the rights of the action under a performance bond accrue only to the obligee named on the bond; in the event of default, the surety's liability on the performance bond is limited to the cost of completion of the contract work, less the balance of unexpended funds; under no circumstances will the liability exceed the penal sum of the bond; the surety will not be liable for indemnification or compensation of the obligee for loss or liability arising from personal injury or property damage, even if the injury or damage caused by a breach of the bonded contract; and the surety will receive any indemnification, and the identical standard of applicable laws or regulations. Federal Facilities: DOD Interim Rule Outlines Liability Limits For Environmental Cleanup Contract Sureties, 23 Env'tl. Rptr. 1646 (23 Oct. 1992). This interim rule implements § 336 of the 1992 Defense Authorization Act. See also DAC 91-31.

<sup>370</sup> Indemnification of the DOD environmental contractors remains a controversial & divisive issue for Congress. An amendment to the 1992 DOD authorization bill would have required the DOD to write regulations to indemnify cleanup contractors. The amendment did not receive sufficient support and was dropped from the bill. The matter is far from resolved. DOD has agreed to study the problem and submit a report to the House by 15 May 1993. See Federal Facilities: Senate Approves Limited Indemnification For Cleanup Contractors At Military Bases, 23 Env'tl. Rptr. (BNA) 1463 (25 Sep. 1992); EPA Concerned Over Defense Act's Contractor Indemnification, 20 Pesticide & Toxic Chemical News (7 Oct.

## 2. PERFORMANCE SCHEDULE

The prospective contractor must establish its ability to comply with the proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments<sup>371</sup>. A number of factors, including a record of delinquencies and work force problems, may indicate an inability to meet the schedule of performance in the pending contract. Past performance delinquencies are relevant, but the contractor's ability to meet the performance schedule as of the date of award is the key. In Cincpac, Inc., the GAO upheld an affirmative responsibility determination where the contractor was able to overcome delinquencies on another contract to show that, as of the date of award of the pending contract, there were no delinquencies<sup>372</sup>.

A nonresponsibility determination may be upheld where the agency found the prospective contractor lacked the resources and materials on hand to meet the contractual requirements and was unlikely to obtain them in time<sup>373</sup>.

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1992), available on LEXIS, environmental library, periodical file; Cleaning Up Federal Facilities: Controversy Over An Environmental Peace Dividend, supra note 35.

<sup>371</sup> FAR 9.104-1(b) [FAC 84-18, FAC 90-8].

<sup>372</sup> B-243366, July 15, 1991, 91-2 CPD ¶ 57.

<sup>373</sup> All Points International, Inc., B-243901, Aug. 5, 1991, 91-2 CPD ¶ 182; Comp. Gen. Dec. B-166969, 49 Comp. Gen. 139 (Sep. 2, 1969); Comp. Gen. Dec. B-124614, 35 Comp. Gen. 161 (Sep. 29, 1955).

Delinquencies under prior contracts for which the contractor utilized the services of subcontractors may properly be considered by the CO in determining the responsibility of the contractor, where the pending contract also relies on the use of subcontractors<sup>374</sup>. A prime contractor may be determined nonresponsible where that contractor proposed to rely on a subcontractor that had a history of delinquency of performance<sup>375</sup>.

### 3. HISTORY OF PAST PERFORMANCE

Probably the most self-evident element of responsibility is how the contractor did on similar work in the recent past. The prospective contractor must have a satisfactory performance record<sup>376</sup>. A prospective contractor that is, or recently has been, seriously deficient in contract performance will be presumed to be nonresponsible, unless the CO

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<sup>374</sup> Marathon Watch Company, Ltd., B-247043, Apr. 23, 1992, 92-1 CPD ¶ 384; Aydin Vector Division, B-244838, Nov. 13, 1991, 91-2 CPD ¶ 455; NJCT Corp., B-219434, Sep. 26, 1985, 64 Comp. Gen. 883 (1985), 85-2 CPD ¶ 342.

<sup>375</sup> L&M Mercadeo International, S.A., B-250637, Unpub., Feb. 11, 1993, available on WESTLAW, Government contracts library, Comp. Gen. file. In that GAO decision the subcontractor's delinquency on the former contract resulted in the termination for default of the prime. The CO was able to verify that the subcontractor had taken corrective action to avoid similar problems on the pending contract.

<sup>376</sup> FAR 9.104-1(c) [FAC 84-38, FAC 84-39, FAC 90-8]; Flameco Div. of Barnes Group, Inc., B-243872, Aug. 1991, 91-2 CPD ¶ 123; Pittman Mechanical Contractors, Inc.--Recon., B-242243.3, May 31, 91-1 CPD ¶ 525.

determines that the circumstances were properly beyond the control of the contractor, or that the contractor had taken corrective action<sup>377</sup>. Thus, the burden is on the prospective contractor to demonstrate affirmatively that it is responsible<sup>378</sup>. When competitive negotiations are used, evaluation of the contractor's past performance does not relieve the contractor of the additional burden of demonstrating the acceptability of the technical proposal<sup>379</sup>. As stated above in Part III.B.1, in the case of the sealed bidding, the responsibility of the contractor is not even examined unless the bidder first submits the low priced, responsive bid.

The FAR provision states that past failure to apply sufficient tenacity and perseverance to perform acceptably is strong evidence of nonresponsibility<sup>380</sup>. In examining this element of responsibility the CO must look to the specific circumstances. The CO shall consider the number of contracts involved and the extent of deficient performance in each contract when making the determination<sup>381</sup>. Tenacity and perseverance are discussed in Part III.E.8 of this paper as a

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<sup>377</sup> FAR 9.104-3(c) [FAC 84-38, FAC 84-39, FAC 90-8]; Becker & Schwindenhammer GmbH, B-225396, Mar. 2, 1987, 87-1 CPD ¶ 255.

<sup>378</sup> Id.

<sup>379</sup> Intelcom Support Svcs., Inc., B-225600, May 7, 1987, 87-1 CPD ¶ 487.

<sup>380</sup> FAR 9.104-3(c) [FAC 84-38, FAC 84-39, FAC 90-8].

<sup>381</sup> Id.



separate element of responsibility.

Unsatisfactory performance may manifest itself in a number of different ways. One of those ways is delinquency in performance. The delinquency must generally be more than merely trivial<sup>382</sup>. The agency's determination of nonresponsibility may also be based upon the contract agency's reasonable perception of inadequate prior performance, even where the circumstances did not warrant termination for default<sup>383</sup>. The failure of an affiliate may be attributed to the associated firm, especially where the two firms were closely intertwined<sup>384</sup>. Failure to manage or control subcontractors is certainly relevant to the issue of a

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<sup>382</sup> Engineered Fabrics Corp., B-244566, Oct. 29, 1991, 91-2 CPD ¶ 392 (The contractor was properly found nonresponsible where it was delinquent in 7 of 26 U.S. Air Force contracts and all the delinquencies were due to its own lack of diligence.); Metalcastello, s.r.l., B-244510, Oct. 21, 1991, 91-2 CPD ¶ 350 (The contractor had a delinquency rate of 66% on three U.S. Army contracts.); International Paint USA, Inc., B-240180, Oct. 30, 1990, 90-2 CPD ¶ 349 (IP was terminated for default on 53 purchase orders and had received deficiency notices on its three most recent contracts.); BMV Div. of Harsco Corp., B-233081, B-233081.2, Jan. 24, 1989, 89-1 CPD ¶ 67 (BMV was delinquent in 14 of 25 current contracts and no corrective action had been taken.); The Aeronetics Div. of AAR Brooks & Perkins, B-222791, B-222516, Aug. 5, 1986, 86-2 CPD ¶ 151 (Contractor had two delinquencies over the past year for the same product being procured.)

<sup>383</sup> Reel-O-Matic Systems, Inc. v. United States, 16 Cl. Ct. 93 (1989); PNM Construction, Inc. v. United States, 13 Cl. Ct. 745 (Nov. 30, 1987); Aydin Vector Division, B-244838, Nov. 13, 1991, 91-2 CPD ¶ 455; Firm Erich Bernion GmbH, B-233106, Dec. 28, 1988, 88-2 CPD ¶ 632; Applied Power Technology Co., Contract Services Co., B-227888, Oct. 20, 1987, 87-2 CPD ¶ 376, aff'd B-227888.2, Mar. 10, 1988, 88-1 CPD ¶ 247.

<sup>384</sup> Decker and Company: Baurenovierungsgesellschaft, m.b.H., B-220817, et al., Unpub., Jan. 28, 1986, available on WESTLAW, Government contracts library, Comp. Gen. file.

contractor's responsibility. Delays on prior contracts due to the subcontractors or to suppliers are generally attributable to the prime contractor since it relates to responsibility determinations on the current acquisition<sup>385</sup>. Improper substitution of nonconforming material is also relevant to the prospective contractor's responsibility<sup>386</sup>. In addition, a prospective contractor's poor performance as a subcontractor on a prior Federal contract can be used as evidence that the contractor lacks responsibility to perform as a prime contractor<sup>387</sup>.

However, this is not to suggest that any prior problems with past performance justify excluding a bidder/offeror from award. Each case must be evaluated on its own merits<sup>388</sup>.

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<sup>385</sup> Marathon Watch Co., Ltd., B-247043, Apr. 23, 1992, 92-1 CPD ¶ 384; Ingenieria Y Construcciones, S.A., B-241043, Dec. 28, 1990, 90-2 CPD ¶ 524; Garten-und Landschaftsbau Frank Mohr, B-237276, B-237277, Feb. 13, 1990, 90-1 CPD ¶ 186; Firm Erich Bernion GmbH, B-234680, B-234681, July 3, 1989, 89-2 CPD ¶ 1; NJCT Corp., B-219434, Sep. 26, 1985, 64 Comp. Gen. 883 (1985), 85-2 CPD ¶ 342.

<sup>386</sup> International Paint USA, Inc., B-240180, Oct. 30, 1990, 90-2 CPD ¶ 349.

<sup>387</sup> The prospective contractor was properly determined nonresponsible, according to GAO, where its performance as a subcontractor was marred by a lack of quality & poor workmanship and the work on the pending contract was similar to subcontract work, only larger in scale and more complex. MCI Constructors, Inc., B-240655, Nov. 27, 1990, 90-2 CPD ¶ 431.

<sup>388</sup> In a protest that has been sealed and is therefore unavailable for review, the incumbent contractor for DOE at the Hanford Weapon Facility in Washington claimed, among other complaints, that its past performance record as the engineer/constructor contractor for the massive cleanup effort of the Federal site was not considered in the source selection for the replacement contract for the same work. While the specifics of the protest are not known, the agency apparently

Even problems that resulted in a default termination do not necessarily require rejection of a firm as nonresponsible. Such a termination is a matter for consideration in determining a contractor's responsibility<sup>389</sup>. As stated above, the Federal acquisition regulations contain a presumption of nonresponsibility with respect to any contractor which has been found to be seriously deficient in contract performance, unless the CO determines that the circumstances were properly beyond the contractor's control, or that appropriate corrective action has been taken by the contractor<sup>390</sup>. Several additional factors should be considered by the CO, including the complexity and size of the project as well as the experience and past performance of the individual officers and employees<sup>391</sup>.

The importance of past performance as an indicator of contractor responsibility has been emphasized in the past few years, with changes in policy initiated by the Office of

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took corrective action to remedy the alleged error. Kaiser Engineers Hanford Co., B-249367.5, Sep. 14, 1992, 92-2 CPD ¶ 177; Hanford Incumbent's Protest of DOE's Corrective Action Dismissed as Premature, 58 Fed. Cont. Rpt. (PNA) 215 (24 Aug. 1992); Hanford Incumbent Files Second Protest, 58 Fed. Cont. Rpt. (BNA) 194 (17 Aug. 1992); Hanford Incumbent Protests Replacement, 58 Fed. Cont. Rpt. (BNA) 79 (20 July 1992).

<sup>389</sup> MCI Contractors, Inc., B-240655, Nov. 27, 1990, 90-2 CPD ¶ 431; S.A.F.E. Export Corp., B-208744, Apr. 22, 1983, 83-1 CPD ¶ 437, aff'd B-208744.2, July 14, 1983, 83-2 CPD ¶ 90.

<sup>390</sup> FAR 9.104-3(c) [FAC 84-38, FAC 84-39, FAC 90-8]; Becker & Schwindenhammer GmbH, B-225396, Mar. 2, 1987, 87-1 CPD ¶ 235.

<sup>391</sup> Cibinic, supra note 229, at 21.

Federal Procurement Policy (hereinafter OFPP). In April 1991, the OFPP issued a policy letter requiring contract agencies to use past performance as an evaluation factor in service contracts<sup>392</sup>. A more recent policy letter has expanded that basic guidance. On January 11, 1993 the OFPP issued new policy guidance that requires Federal agencies to evaluate contractor performance on all negotiated contracts valued at more than \$100,000. In addition, the agencies must specify past performance as an evaluation factor in solicitations of offers for all competitively negotiated contracts expected to exceed \$100,000<sup>393</sup>. The January 11, 1993 letter also established that past performance information must be used by agencies in making responsibility determinations in both sealed bids and competitively negotiated procurements<sup>394</sup>. This new policy letter further established provisions for a modicum of due process procedures for the contractors, for newly established firms to compete for award even though they lack a history of performance, and for respecting the confidentiality of the information due to the sensitive nature of contractor histories<sup>395</sup>. The policies established by the

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<sup>392</sup> OFFICE OF FEDERAL PROCUREMENT POLICY Policy Letter 91-2, 56 Fed. Reg. 15110, April 15, 1991 & 56 Fed. Reg. 63988 (6 Dec. 1991).

<sup>393</sup> OFFICE OF FEDERAL PROCUREMENT POLICY Policy Letter 92-5, 58 Fed. Reg. 3573 (11 Jan. 1993). See Acquisition Policy: OFPP Requires Agencies to Consider Past Performance in Making Awards, 59 Fed. Cont. Rpt. (BNA) 31 (Jan. 31, 1993).

<sup>394</sup> Id., at 31.

<sup>395</sup> Id., at 32.

January 1993 letter took effect on Federal agencies immediately, and implementing regulations are to be published within the year<sup>396</sup>. This guidance should clarify for both the bidder/offeror and the Government contracting staff the significant role past performance will play in responsibility determinations<sup>397</sup>.

While the 1993 OFPP policy letter was not tailored to environmental source selections, it does highlight the need for a standardized approach towards responsibility determinations. An example of past performance being used effectively during source selection is found in GEO-CON, Inc. v. United States<sup>398</sup>. The low bidder on a U.S. Army COE solicitation for remediation at a hazardous substance site was determined to be nonresponsible, and therefore ineligible for award. The CO's determination was based upon a pre-award survey that revealed the firm's past performance on a COE

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<sup>396</sup> Id.; Federal agencies have complained that there is no existing system for compiling and using the past performance information that will be generated as a result of this new OFPP policy. The inference is that if existing systems cannot accommodate the new infusion of data, agencies will have to resort to automated data based systems. OFPP Issues Final Policy on Past Performance Information: Explanatory Text to OFPP Policy Letter 92-5, supra note 286.

<sup>397</sup> One of the comments directed at the draft version of the OFPP January 1993 policy letter was that there is no standardized system into which data can be compiled. In the final version of the letter the agencies are tasked to determine whether existing agencies, systems can consolidate the past performance information. OFPP Issues Final Policy on Past Performance Information - Explanatory Text of OFPP Policy Letter 92-5, supra note 286, at 100,653.

<sup>398</sup> 783 F. Supp. 1 (D.C. Cir. 1992).

Superfund site was unacceptable<sup>399</sup>. The contractor unsuccessfully challenged the finding of the CO. Upon review, the Court found the CO's rationale reasonable and within the parameters of the laws and regulations.

#### 4. MANAGEMENT/TECHNICAL CAPABILITY

The prospective contractor must also have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them. This includes property control systems, quality assurance measures, and safety programs applicable to the services being rendered<sup>400</sup>. If the contractor does not have such skills and expertise in-house, the contracting officer must require evidence that such skills will be obtained by the time of award of the contract<sup>401</sup>. The nonresponsibility finding on a prime contractor may be based upon the deficiencies of the subcontractors' technical and production capability<sup>402</sup>. A

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<sup>399</sup> The PAS also revealed that two of GEO-CON's employees had been convicted for conspiracy to defraud the Federal Government on that same contract. Id.

<sup>400</sup> FAR 9.104-1(e) [FAC 84-18, FAC 90-8]; Pittman Mechanical Contractors, Inc.--Recon., B-242243.3, May 31, 1991, 91-1 CPD ¶ 525; PTR-Precision Technologies, Inc., B-243439, Aug. 1, 1991, 91-2 CPD ¶ 110; Omneco, Inc., Aerojet Production Co., B-218343, B-218343, June 10, 1985, 85-1 CPD ¶ 660.

<sup>401</sup> FAR 9.104-3(b) [FAC 84-38, FAC 84-39, FAC 90-3].

<sup>402</sup> Omneco, Inc., Aerojet Production, Co., B-218343, B-218343.2, June 10, 1985, 85-1 CPD ¶ 660; Amoco Tool & Die, B-207191, Feb. 28, 1983, 62 Comp. Gen. 213 (1983), 83-1 CPD ¶

lack of management and technical capability may be implied by the lack of personnel with the requisite skills to perform the types of tasks identified in the contract. In the GAO decision of MARTECH USA, Inc., a firm that had successfully competed for and performed in several asbestos abatement and oil spill response contracts tried to diversify its workload by competing for Federal construction/renovation projects. The agency CO found that the specialized firm lacked the skills to perform the generic renovation/construction contracts. The GAO upheld the determination<sup>403</sup>.

In practice, technical/management capabilities often overlap with previous poor contract performance. It is the history of poor performance that indicates the contractor's management and technical deficiencies. Symptoms of poor management capability generally are evidenced by other problems. These problems may include tardy start-up of work, inadequate supervision, failure to inspect work, a poor safety record, and inadequate quality control<sup>404</sup>. Chronically missing milestones, untimeliness of performance, or safety violations may demonstrate inadequate management skills<sup>405</sup>.

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<sup>403</sup> B-244714, Nov. 12, 1991, 91-2 CPD ¶ 447.

<sup>404</sup> Reel-O-Matic Systems, Inc. v. United States, 16 Cl. Ct. 93 (1989); PNM Construction, Inc. v. United States, 13 Cl. Ct. 745 (Nov. 30, 1987); Firm Otto Einhaupl, B-241553, et al., Feb. 20, 1991, 91-1 CPD ¶ 192.

<sup>405</sup> Campbell Industries, B-238871, July 3, 1990, 90-2 CPD ¶ 5.

A lack of management or technical capability is often a culmination of numerous other chronic problems<sup>406</sup>.

Poor management may also manifest itself in the lack of management and control of a prospective contractor's subcontractors<sup>407</sup>. Control of subcontractors is critical in environmental remediation contracts where the prime is responsible for multiple subcontractors working on various aspects of the overall cleanup. An example of why subcontractor management is critical on environmental remediation contracts is the DOE restoration effort at the Fernald nuclear weapons facility in Ohio, where the DOE's prime contractor is reputed to have had trouble administering some of the more than 1000 subcontractors at work on the site<sup>408</sup>. Needless to say, as the complexity of the remediation effort and the number of subcontractors increases, the ability of the prime contractor to synchronize the subcontractors becomes more critical.

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<sup>406</sup> In MCI Constructors, B-240655, Nov. 27, 1990, 90-2 CPD ¶ 431, the GAO agreed with the CO that the contractor was "fundamentally inefficient". The three previous Government contracts were characterized by poor workmanship and tardy performance, including one where the contractor simply abandoned the job site.

<sup>407</sup> Campbell Industries, B-238871, July 3, 1990, 90-2 CPD ¶ 5; Firm Erich Bernion GmbH, B-234680, B-234681, July 3, 1989, 89-2 CPD ¶ 1; David Boland, Inc., B-221845, May 23, 1986, 86-1 CPD ¶ 484.

<sup>408</sup> Pasternak, supra note 79, at 46.



## 5. EQUIPMENT/FACILITIES CAPABILITY

A prospective contractor must also have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them<sup>409</sup>. Except to the extent the prospective contractor has sufficient resources or proposes to perform the contract by subcontracting, the CO shall require acceptable evidence of the prospective contractor's ability to obtain required resources at any time prior to award of the contract<sup>410</sup>. Acceptable evidence normally consists of a commitment or explicit arrangement that will be in existence at the time of contract award to rent, purchase, or otherwise acquire the needed facilities, equipment, other resources, or personnel<sup>411</sup>. Examples of justifiable nonresponsibility based on the lack of requisite facilities include several recent naval contracts where the prospective contractor did not have drydock facilities to

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<sup>409</sup> FAR 9.104-1(f) [FAC 84-18, FAC 90-8]; CINCPAC, Inc., B-243366, July 15, 1991, 91-2 CPD ¶ 57; BMV Div. of Harsco Corp., B-233081, B-233081.2, Jan. 24, 1989, 89-1 CPD ¶ 67; Comp. Gen. Dec. B-180460, 53 Comp. Gen. 932 (June 10, 1974).

<sup>410</sup> FAR 9.104-3(b) [FAC 84-38, FAC 84-39, FAC 90-8]; FAR 9.104-1(f) [FAC 84-18, FAC 90-8]; Norfolk Shipbuilding & Drydock Corp., B-248549, B-248549.2, Aug. 26, 1992, 92-2 CPD ¶ 127.

<sup>411</sup> FAR 9.104-3(b) [FAC 84-38, FAC 84-39, FAC 90-8]; Electro Design Manufacturing, Inc., B-234848, July 14, 1989, 89-2 CPD ¶ 50.

perform the work specified in the solicitation<sup>412</sup>. Whether a prospective contractor has the specialized facilities necessary to perform its contractual duties may be relevant to contracts for transportation and disposal of hazardous wastes, as well as other environmental services and construction.

## 6. BUSINESS ETHICS/INTEGRITY

### a. INTRODUCTION ETHICS/INTEGRITY

The concept of responsibility implies not only that the awardee have the capability to complete a contract, but also the honesty and integrity to do so. Mere technical capability is not enough<sup>413</sup>. Therefore, before awarding a contract, the contracting officer must determine that the prospective awardee has a satisfactory record of integrity and business ethics<sup>414</sup>. Such a determination is based on subjective business judgment and is, therefore, discretionary with the

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<sup>412</sup> Braswell Services Group, Inc., B-248336, Aug. 19, 1992, 92-2 CPD ¶ 113; Norfolk Shipbuilding & Drydock Corp., B-248549, B-248549.2, Aug. 26, 1992, 92-2 CPD ¶ 127; Deytens Shipyards, Inc., B-244918, B-244918.2, Dec. 3, 1991, 71 Comp. Gen. 101 (1991), 91-2 CPD ¶ 500.

<sup>413</sup> Reemer v. Hoffman, 419 F. Supp. 130 (D.C. Cir. 1976), rev'd & remanded on other ground D.C. Cir. No. 82-1461, Aug. 9, 1983.

<sup>414</sup> FAR 9.104-1(d) [FAC 84-18, FAC 90-8]; FAR 14.404-2(g); Standard Tank Cleaning Corp., B-245364, Jan. 2, 1992, 92-1 CPD ¶ 3; Frank Cain & Sons, Co., B-236893, Jan. 11, 1990, 90-1 CPD ¶ 44; Schnitzer, supra note 248, at 16-4.

government procurement officials<sup>415</sup>. Whether evidence of an offeror's lack of integrity is sufficient to warrant a nonresponsibility determination on the pending contract is a matter primarily for the contracting agency's judgment, and is not subject to review unless it is shown to lack a reasonable basis<sup>416</sup>. The evidence supporting a nonresponsibility determination based on a lack of integrity must be substantial and consist of more than suspicions or allegations<sup>417</sup>.

A relevant inquiry is whether there was unethical conduct by the awardee. Criminal misconduct, as evidenced by an investigation for procurement related unethical conduct, may indicate a lack of integrity. However, the mere existence of an investigation is generally not dispositive where there has not been a suspension or debarment<sup>418</sup>. Obviously, a preaward investigation has more persuasive weight for the purpose of the responsibility determination where it is

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<sup>415</sup> MOHEAT, Inc., B-239378, May 3, 1990, 90-1 CPD ¶ 446; Garten-und Landschaftsbau GmbH Frank Mohr, B-237277, B-237276, Feb. 13, 1990, 90-1 CPD ¶ 186; Frank Cain & Sons, Inc., B-236893, Jan. 11, 1990, 90-1 CPD ¶ 44; John Carlo, Inc., B-204928, Mar. 2, 1982, 82-1 CPD ¶ 184.

<sup>416</sup> General Painting Company, Inc., B-219449, Nov. 8, 1985, 85-2 CPD ¶ 530; Americana de Comestibles S.A., B-210390, Mar. 13, 1984, 84-1 CPD ¶ 289,

<sup>417</sup> P.T. & L. Construction Co., Inc., B-183966, Oct. 2, 1975, 55 Comp. Gen. 343 (1975), 75-2 CPD ¶ 208.

<sup>418</sup> Krug International, B-232291, B-232291.2, Feb. 6, 1989, 89-1 CPD ¶ 116.

supported by documented instances of the misconduct<sup>419</sup>.

Criminal misconduct resulting in a conviction is an indicator of a lack of integrity<sup>420</sup>. However, not all apparent misconduct necessarily results in nonresponsibility determinations. In many instances, allegations of criminal misconduct are settled prior to litigation<sup>421</sup>. This is not to suggest that in some circumstances an ongoing investigation by itself is never enough to render a prospective contractor nonresponsible. In some cases, a nonresponsibility finding was justifiably based solely upon an investigation<sup>422</sup>. In other cases, the investigation may be used by the CO as a basis for an independent agency investigation to substantiate

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<sup>419</sup> ESCO Inc., B-225565, Apr. 29, 1987, 87-1 CPD ¶ 450; Becker & Schwindenhammer GmbH, B-225396, Mar. 2, 1987, 87-1 CPD ¶ 235.

<sup>420</sup> FAR 9.406-2(a). GEO-CON, Inc. v. United States, 783 F. Supp. 1 (D.C. Cir. 1992).

<sup>421</sup> Paul A. d'Alosio, Accusations of Criminal Conduct By Government Contractors: The Remedies, Problems, & Solutions, 17 Pub. Cont. L. J. 265, 272. As an example, an environmental testing laboratory under contract to DOE is reported to have been allowed to continue work under other DOE contracts under a consent order with the DOJ, despite a Federal investigation indicating integrity violations at one of the firm's labs. Pasternak, supra note 79, at 45.

<sup>422</sup> In Energy Management Corp., B-234727, July 12, 1989, 89-2 CPD ¶ 38, the nonresponsibility was based upon an ongoing investigation concerning procurement fraud by the firm's president on a prior government contract. In Cubic Corp. v. Cheney, U.S. District Ct. No. 89-1617, Unpub., Aug. 1989, the contractor's nonresponsibility determination was based upon evidence of employee misconduct generated during the "Ill Wind" investigation. See also P.T. & L. Const. Co., Inc., B-183966, Oct. 2, 1975, 53 Comp. Gen. 343 (1975), 75-2 CPD ¶ 208.

the misconduct.<sup>423</sup>

Failure to pay prevailing wage rates on prior Government contracts may be a sufficient and reasonable basis for finding the contractor lacks integrity to perform the pending contract. In Greenwood's Transfer & Storage Co., Inc., the GAO upheld the CO's nonresponsibility determination for a prospective contractor where it was shown that the contractor willfully failed to pay its workers minimum wage on six previous government contracts<sup>424</sup>. Similarly, in General Painting Company, Inc., the prospective contractor was found to have violated the wage rates on 11 government contracts over the past year. The GAO upheld the CO's nonresponsibility determination even though the contractor's failure to pay was not shown to be willful<sup>425</sup>.

**b. DEFACTO SUSPENSIONS/DEBARMENTS.**

The suspension and debarment of contractors appears to be receiving a heightened focus as a means of addressing environmental problems<sup>426</sup>. The scope, effect, and procedures

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<sup>423</sup> Garten-und Landschaftsbau GmbH Frank Mohr, B-237277, B-237276, Feb. 13, 1990, 90-1 CPD ¶ 186; John Carlo, Inc. B-204928, Mar. 2, 1982, 82-1 CPD ¶ 184.

<sup>424</sup> B-186438, Aug. 17, 1976, 76-2 CPD ¶ 167.

<sup>425</sup> B-219449, Nov. 8, 1985, 85-2 CPD ¶ 530.

<sup>426</sup> W. Jay DeVecchio & Devon Engel, EPA Suspension, Debarment, and Listing: What EPA Contractors Can Learn From the Defense Industry (and Vice Versa), 22 Pub. Cont. L. J. 55, 65 (Fall 1992).

of suspension and debarment in Federal procurements is far too broad for the limited purposes of this paper<sup>427</sup>. But, a few basic concepts of defacto debarment are relevant to this discussion on determinations of responsibility.

For instance, it is not permissible to use multiple nonresponsibility determinations on a prospective contractor as a de facto debarment or de facto suspension<sup>428</sup>. Yet, multiple nonresponsibility determinations under contemporaneous procurement do not necessarily constitute a de facto suspension or debarment, where they are based on the current available information reasonably showing recent deficient performance under prior contracts<sup>429</sup>. Second, suspension and debarment is not to be used for punitive purposes<sup>430</sup>. Unlike other elements of responsibility, an offeror is entitled to due process when found to be nonresponsible on the basis of the lack of integrity, owing to

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<sup>427</sup> The basic standards and procedures for suspension and debarments are detailed in FAR Subpart 9.4. Suspension or debarments may be invoked by the EPA using the FAR provisions or EPA's regulation, 40 C.F.R. Part 32.

<sup>428</sup> Leslie & Elliot Co. v. Garrett, 732 F. Supp. 191 (D.D.C. 1990); Related Industries, Inc. v. United States, 2 Cl. Ct. 517 (1983); Pittman Mechanical Contractors, Inc.--Recon., B-242243.3, May 31, 1991, 91-1 CPD ¶ 525.

<sup>429</sup> Becker & Schwindenhammer GmbH, B-225396, Mar. 2, 1987, 87-1 CPD ¶ 235. Standard Cleaning Corp., B-245364, Jan. 2, 1992, 92-1 CPD ¶ 3; Garten-und Landschaftsbau GmbH, B-237276, Feb. 13, 1990, 90-1 CPD ¶ 186.

<sup>430</sup> FAR 9.402(b) [FAC 84-46]; Brown Construction Trades v. United States, 23 Cl. Ct. 214 (1991).

the stigmatizing effect on the contractor<sup>431</sup>.

c. INTEGRITY & ENVIRONMENTAL CONTRACTS.

Two examples suggest that the integrity of the prospective contractor is a viable element in responsibility determinations on environmental services procurements. In Standard Tank Cleaning Corp.<sup>432</sup>, the GAO upheld the U.S. Navy's finding that the contractor was not responsible for a hazardous waste analysis and removal contract where the contractor had a long history of serious environmental problems. The contractor had 150 citations over a seven year period for violations of state environmental statutes issued by the New Jersey Department of Environmental Protection. Nine of those citations occurred under the firm's new management. The nine most recent citations undercut the firm's rebuttal that it had corrected its past problems. The State of New York had revoked the firm's license to operate

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<sup>431</sup> Old Dominion Dairy Products, Inc. v. United States, 631 F. 2d 953 (CA D.C. 1980); Art-Metal USA, Inc. v. Solomon, 437 F. Supp. 1 (D.D.C. 1978); PNM Construction, Inc. v. United States, 13 Cl. Ct. 745 (1987); Related Industries, Inc. v. United States, 2 Cl. Ct. 517 (1983); see also Brian D. Shannon, The Government-Wide Debarment & Suspension Regulations After A Decade, 134 Mil. L. Rev. 1 (Fall 1991) reprinted in 21 Pub. Cont. L. J. 370 (Spring 1992); Howard W. Cox, Due Process Issues in Suspension & Debarment: A Government Perspective, 43 Fed. Cont. Rpt. 429 (3-11-1985); Gerald P. Norton, The Questionable Constitutionality of the Suspension & Debarment Provisions of the Federal Acquisition Regulations: What Does Due Process Require?, 18 Pub. Cont. L. J. 633 (1989).

<sup>432</sup> B-245364, Jan. 2, 1992, 92-1 CPD ¶ 3.

barges in the State's waters after one of the firm's barges sank while transporting hazardous waste. The sinking of that barge led to the criminal conviction of the firm's president. The U.S. Navy's nonresponsibility determination was also supported by numerous environmental violations by the firm's affiliates. All in all, the GAO found the CO's finding of nonresponsibility was reasonable and based on accurate evidence<sup>433</sup>.

In the second decision, Interwaste Services Co., the GAO upheld the agency's finding of nonresponsibility on a contract for the transport and disposal of hazardous wastes generated by several DOD installations<sup>434</sup>. The CO's determination had been based on a Defense Contract Services Management Area (DCASMA) preaward survey, which noted that Interwaste Services Corp. (ISC) was to rely exclusively on its parent firm for performance of the pending contract. The circumstances implied that the two firms were really a single entity, with ISC acting as a sham offeror to avoid the nonresponsibility issue. The parent firm, NSSI, had a terrible history of late deliveries and deliveries to the wrong disposal sites on three previous DOD hazardous waste disposal contracts. The GAO found that the CO properly attributed the parent's performance deficiencies on the parent's previous contracts to ISC for the purposes of a

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<sup>433</sup> Id.

<sup>434</sup> B-224407, Oct. 2, 1986, 86-2 CPD ¶ 385.



responsibility determination<sup>435</sup>.

## 7. COMPLIANCE WITH APPLICABLE LAWS AND REGULATIONS

### a. INTRODUCTION TO COMPLIANCE

A prospective contractor must be qualified and eligible to receive an award under applicable laws and regulations<sup>436</sup>. This is a very broad, shotgun approach. It can be applied to numerous situations, including permits/ licenses & environmental compliance, as well as others<sup>437</sup>. Compliance with all the applicable statutes and regulations is no mean task in light of the fact that there are over 4000 Federal statutes and executive orders that impact on the government procurement process<sup>438</sup>, not to mention the myriad of state

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<sup>435</sup> Id. at 5 & 6. The GAO discounted some of the additional deficiencies noted by the CO stating that those problems were either not proper responsibility considerations, or could have been corrected and by themselves would not justify a finding of nonresponsibility. The other deficiencies noted in the PAS, but discounted by the GAO as fixable, included the lack of in-house transportation and disposal facilities. Reliance on subcontractors and a lack of prudent record keeping were viewed by GAO as incidental.

<sup>436</sup> FAR 9.104-1(g) [FAC 84-18, FAC 90-8].

<sup>437</sup> It is not clear whether alleged violations of foreign law is applicable. As a general rule, the GAO will not review protests alleging that awardee's labor practices in foreign countries violate U.S. policy, since the allegation does not concern a violation of procurement law or regulation. Anderson Columbia Co., Inc., B-249475.2, Oct. 27, 1992, 92-2 CPD ¶ 288.

<sup>438</sup> U.S. Army, Procurement Law, ¶ 27-2 (DA PAM 27-153 Sep. 1986).

and local laws and ordinances that may also impact individual projects. Due to its expansive scope, FAR 9.104-1 can be used effectively by the DOD COs to help determine whether a prospective contractor is responsible for environmental contracts.

**b. PERMITS/LICENSES**

Where an IFB provision requires the successful bidder to meet all requirements for Federal, state, and local codes, the provision pertains to responsibility, not responsiveness<sup>439</sup>. Normally, the CO is not expected to inquire into what those requirements may be or whether the bidder will comply<sup>440</sup>. However, where the lack of a license could preclude performance, the CO may inquire into the offeror's ability to obtain the license or permit<sup>441</sup>. If questions arise, the bidder should be allowed a reasonable opportunity after bid

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<sup>439</sup> United International Investigative Services, B-243720, May 6, 1990, 91-1 CPD ¶ 443; Northcoast Redwood Tours, B-231770, July 6, 1988, 88-2 CPD ¶ 14; New Haven Ambulance Services, Inc., B-190223, Mar. 22, 1978, 78-1 CPD ¶ 225; Comp. Gen. Dec. B-178969, 53 Comp. Gen. 36 (July 19, 1973); Comp. Gen. Dec. B-174083, 51 Comp. Gen. 377 (Dec. 21, 1971); Comp. Gen. Dec. B-163156, 47 Comp. Gen. 539 (Apr. 11, 1968); Comp. Gen. Dec. B-1600085, 46 Comp. Gen. 326 (Oct. 18, 1966).

<sup>440</sup> James C. Bateman Petroleum Svcs., Inc. dba Semco, B-232325, Aug. 22, 1988, 88-2 CPD ¶ 170. See also Rowe Contracting Svcs., Inc., B-228647, Oct. 29, 1987, 87-2 CPD ¶ 416.

<sup>441</sup> VIP Limousine Service, Inc., B-225639, Jan. 29, 1987, 87-1 CPD ¶ 98, aff'd 87-1 CPD ¶ 225; What-Mac Contractors, Inc., B-192188, Sep. 6, 1979, 58 Comp. Gen. 767 (1979), 79-2 CPD ¶ 179.

opening to demonstrate it can promptly obtain the requisite certification<sup>442</sup>. However, at some point where the circumstances indicate the contractor cannot receive certification in a timely manner, the contractor should be considered nonresponsible<sup>443</sup>.

In environmental construction or services acquisitions, whether the requirement for a permit or license is a matter of responsibility, as opposed to a responsiveness issue, will depend upon the language in the solicitation<sup>444</sup>. For instance, in an asbestos abatement contract the GAO found that where there is any requirement for a contractor to possess a license to perform asbestos work on a military installation, compliance is between the contractor and the issuing activity. Lack of such a license will not be a bar to award of the contract unless a specific licensing requirement was placed in

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<sup>442</sup> Restec Contractors, Inc., B-245862, Feb. 6, 1992, 92-1 CPD ¶ 154; Carolina Waste Systems, Inc., B-215689.3, Jan. 7, 1985, 85-1 CPD ¶ 22; Capital Ambulance Svc., Inc., B-200770, Sep. 23, 1981, 81-2 CPD ¶ 244; Comp. Gen. Dec. B-174634, et al., 53 Comp. Gen. 51 (July 30, 1973).

<sup>443</sup> Intera Technologies, Inc., B-228467, Feb. 3, 1988, 88-1 CPD ¶ 104; U.S. Jet Aviation, B-214093, May 25, 1984, 84-1 CPD ¶ 575.

<sup>444</sup> Where a solicitation requires licensing or other approval by a regulatory or governmental authority, but does not require that such approval must be obtained prior to contract award, the solicitation provision constitutes a general contract performance requirement. Impact Instrumentation, Inc., B-250968, B-250968.2, Mar. 17, 1993, 93-1 CPD ¶ \_\_\_\_\_. See also DOD Contracts, Inc., B-240590.3, Oct. 22, 1991, 91-2 CPD ¶ 354; Chemical Compounding Corp., B-227333, June 15, 1987, 87-1 CPD ¶ 596.

the solicitation<sup>445</sup>.

Requiring offerors to demonstrate their compliance with Federal, state or local permit/license requirements relating to environmental protection or public safety may be useful as means of highlighting the fact that the Federal agency is serious about preventing harm to the ecosystem. However, if that is the goal, the Federal government is missing the mark. Permits and licenses are inconsistently requested by the COs. When they are requested, enforcing compliance is left to the issuing authority. If such permits and licenses serve a useful purpose, then they should be applied uniformly in Federal environmental contracts, which is something that is not currently being done. Or, in the alternative, the application of the current regulatory provision at FAR 9.104-1(g) should be expanded to include compliance with the relevant state and local codes, as is discussed generally in the next section.

#### **c. ENVIRONMENTAL LAW COMPLIANCE**

It is the policy of the Federal Government to improve environmental quality<sup>446</sup>. Accordingly, executive agencies are instructed to conduct their acquisitions in a manner that

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<sup>445</sup> Environmental Specialists, Inc., B-245782, Jan. 22, 1992, 92-1 CPD ¶ 99; Technology Advancement Group, B-238273, B-238358, May 1, 1990, 90-1 CPD ¶ 439.

<sup>446</sup> FAR 23.103(a).

will result in effective enforcement of the Clean Air Act (CAA) and the Clean Water Act (CWA)<sup>447</sup>. State laws concerning removal and remedial actions apply to cleanup efforts at a Federal site when those locations are not included on the National Priorities List<sup>448</sup>. This is accomplished through the denial of award of contracts to firms listed by the Environmental Protection Agency<sup>449</sup>.

So, aside from being suspended or debarred from Federal contracts, as discussed infra at Part III.E.6.b, the prospective contractor can also be denied award of a Federal contract for being listed by the EPA under the Contractor

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<sup>447</sup> Id.; It is intriguing to note that of the numerous Federal environmental statutes only two, the CWA & CAA, are specifically referenced in the Federal acquisition regulation. FAR 23.102. This is probably due in part to the fact that changes the environmental laws and regulations occur at a rapid pace compared to changes to the FAR regulation. This limited, direct application of environmental laws will be expanded. OFFICE OF FEDERAL PROCUREMENT POLICY Policy Letter 92-4, 57 Fed. Reg. 53,362 (9 Nov. 1992), has tasked the Executive agencies to promulgate rules to implement § 6002 of RCRA, 42 U.S.C. § 6962, by mid-1993. The agency regulations will foster the government's acquisition of environmentally-sound, energy efficient products and services; foster pollution prevention; reduce the generation of hazardous waste; achieve environmental compliance; and promote the use of non-hazardous and recovered materials.

<sup>448</sup> H. R. No. 99-253(V), 99th Cong. (Oct. 1985), reprinted in 1985 U.S.C.C.A.N. 3124, 3170. For an example of state law enforced against a DOD agency see Dickerson, Inc. v. United States, infra at Part II.C.

<sup>449</sup> FAR 23.103(b) [FAC 90-4]; DeVecchio & Engel, supra note 426, at 57. See also Robert W. Martin, Jr., Black-Listing The Polluters, 36 Fed. B. J. 17 (1977), 14 Y.P.A. 453.

Listing Program<sup>450</sup>. Under § 306 of the Clean Air Act (CAA) and § 508 of the Clean Water Act (CWA), the EPA has the authority to prevent "facilities"<sup>451</sup> with continuing or recurring violations of Federal air or water standards from receiving Federal contracts, grants, and loans<sup>452</sup>.

There are two means of listing facilities being sanctioned. The first method of listing is mandatory. Facilities which are convicted of violating air standards under the CAA § 113(c)(1), or water standards under the CWA § 309, are "automatically" listed<sup>453</sup>. The other manner of

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<sup>450</sup> Suspension/debarment and the listing program are not mutually exclusive. DeVecchio & Engel, supra note 426, at 57.

<sup>451</sup> The EPA's authority to list a violator refers to "facilities", not "corporations". The implication is that work can be shifted from a listed "facility" to another facility belonging to the same corporation. DeVecchio & Engel, supra note 426, at 57.

<sup>452</sup> The statutes are implemented by Executive Order No. 11738, 38 Fed. Reg. 25,161 (Sep. 10, 1973); FAR 23.103(b) [FAC 90-4]; 40 C.F.R. Part 15. See also EPA ENFORCEMENT ACCOMPLISHMENTS REPORT: FY 1989, (EPA LE-133 20E-2001) February 1990.

<sup>453</sup> 33 U.S.C. § 1319(c) (1990); 42 U.S.C. § 7606(a) (1990). Mandatory listing is effective immediately upon conviction. A facility that is placed on the List as a result of a mandatory listing may be removed from the List only if: i. EPA's Assistant Administrator for Enforcement certifies that the conditions giving rise to the conviction has been corrected; or ii. a court has reversed the criminal conviction that resulted in the listing. Jonathon S. Cole, EPA's Contractor Listing Program : A List You Do Not Want to Make, 2 Fed. Facil. Envtl. J. 129, 131 & 133 (Summer 1991). See also DeVecchio & Engel, supra note 426, at 59. See generally Edward E. Reich, Contractor Listing: Powerful Sanction For Encouraging Environmental Compliance, 6 Nat. Envtl. Enf. J. 5 (Nov. 1991); Eva M. Fromm, Commanding Respect: Criminal Sanctions For Environmental Crimes, 21 St. Mary's L. J. 821 (1990); Stan Millan, Federal Facilities & Environmental Compliance: Toward a Solution, 36 Loy. L. Rev. 319 (1990);

listing facilities is discretionary. Discretionary listing of a facility requires the EPA to determine that there is a record of continuing noncompliance with the CAA or the CWA standards at the facility and a judicial or administrative "triggering" action based on that noncompliance<sup>454</sup>. The Assistant Administrator of the EPA may list a facility upon request of a state governor, certain members of the EPA, or members of the public<sup>455</sup>. Under the discretionary listing procedures, the facility has the right to an informal administration proceeding regarding the propriety of a pending discretionary listing<sup>456</sup>.

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Michael Donnelly, James G. Van Ness, Warrior and the Druid - the DOD and Environmental Law, 33 Fed. Bar News 37 (1986).

<sup>454</sup> The administrative or judicial "triggering" action may include: (i) a Federal court conviction under CAA § 113(c)(2) of any person who owns, leases, or supervises the facility; (ii) a state or local conviction for a violation of clean air or water standards by any person who owns, leases, or supervises the facility; (iii) the issuing of a Federal, state or local civil ruling, including an injunction, order, judgment, or decree, as a result of noncompliance with air or water standards at the facility; (iv) the violating of an administrative order issued under CAA §§ 113(a), 113(d), 167, or 303, or CWA § 309(a), by a person who owns, leases, or supervises the facility; (v) the issuing of a Notice of Noncompliance by the EPA under CAA § 120; or, filing an enforcement action in Federal court by the EPA under CAA §§ 113(b), 167, 204, 205, or 211, or CWA § 309(b) for noncompliance with clean air or water standards at the facility. 40 C.F.R. § 15.11 (1985). See Cole, supra note 453, at 132.

<sup>455</sup> 40 C.F.R. § 15.4 (1985).

<sup>456</sup> 40 C.F.R. § 15.11 (1985). Removal from the List after a discretionary listing may occur where: i. the conviction, decree, order, or judgment that formed the basis for the listing is reversed; ii. if the EPA Assistant Administrator for Enforcement determines that the facility has corrected the conditions giving rise to the listing; or iii. one year has

The EPA's list, containing firms excluded from receiving Federal contracts for environmental noncompliance, is incorporated each month into the General Services Agency's publication listing all parties excluded from receiving Federal contracts and Federal financial and/or nonfinancial assistance<sup>457</sup>. The GSA publication lists by code the general reason for the party's exclusion, but the specifics of the underlying misconduct are not included.

This is not to imply that a CO cannot act absent a listing by the EPA under the authority and procedures referenced above. An agency may determine that an environmental contractor is nonresponsible based upon the contractor's failure to comply with environmental standards on previous Federal contracts. In R.T. Nelson Painting Service, Inc.<sup>458</sup>, the GAO upheld a CO's recommendation of nonresponsibility to the SBA that was based, in part, on the failure of the prospective contractor to demonstrate it would comply with environmental and safety regulations. The contracting officer's determination was based on numerous violations of environmental laws and regulations by Nelson on

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passed, unless the basis for listing was a criminal conviction in a state court or a court order in a civil enforcement action. Cole, supra note 453, at 134.

<sup>457</sup> GSA OFFICE OF ACQUISITION POLICY, LIST OF PARTIES EXCLUDED FROM FEDERAL PROCUREMENT OR NONPROCUREMENT PROGRAMS, (Oct. 1992). Some limited provisions exist to exempt listing a firm. However, no exemption applies where the facility is to be listed for a conviction of the CAA or the CWA.

<sup>458</sup> B-237638, Feb. 22, 1990, 90-1 CPD ¶ 202.



a prior U.S. Navy contract. The contractor's prior problems had a severe impact on the performance of that contract and opened the Navy to liability under RCRA. In competing for the protested contract, Nelson did not provide any evidence of having taken corrective action to avoid similar violations on the pending contract. Based upon the lack of any indication that Nelson had taken action to secure compliance with environmental standards, the GAO found that the CO had properly found Nelson nonresponsible.

There are checks on the CO's discretion. For the CO to support a determination of nonresponsibility based on past environmental problems, the misconduct must be actual documented violations, not mere speculation or bare allegations. In Keeson, Inc.; Ingram Demolition, Inc.<sup>459</sup> the GAO found a Veteran Administration solicitation, in which any offeror alleged to have violated asbestos regulations had been rejected as nonresponsible regardless of the validity of the allegation, to be unduly restrictive. This solicitation for asbestos removal stated that the prospective contractor must not have been cited, or had not been a defending party of any legal action, for a violation of asbestos regulations during the last five years. The protester had been cited, but was subsequently cleared. The GAO found the solicitation unduly restrictive because it excluded from the competition

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<sup>459</sup> B-245625, B-245655, Jan. 24, 1992, 92-1 CPD ¶ 108.

those contractors exonerated, as well as actual violators<sup>460</sup>.

Subpart 23.1 of the FAR<sup>461</sup> seems to provide very meager guidance for the application of environmental laws and regulations. A careful reading of the subpart suggests that, absent a major revision of that portion of the regulation, Subpart 23.1 will not be a vehicle to incorporate the other relevant environmental statutes. The scope of Subpart 23.1 as it exists today has a very narrow focus<sup>462</sup>. For purposes of procuring environmental cleanup efforts, FAR 9.104-1(g) is a better vehicle to apply the plethora of relevant environmental regulations, statutes, and guidance.

#### d. COMPLIANCE WITH OTHER COLLATERAL POLICIES

The Federal acquisition regulation imposes onto the procurement system many other requirements to implement Federal policies that have little direct relationship to the agency's ability to obtain products or services to meet its requirements. Some of these programs serve to encourage

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<sup>460</sup> Id.

<sup>461</sup> As discussed infra in this subsection, FAR 23.102(b) prohibits executive agencies from entering into, renewing, or extending contracts with firms proposing to use facilities listed by EPA as violating facilities under the Clean Air Act or the Clean Water Act. See also FAR 23.105(b)(3); 42 U.S.C. § 7413(c)(1); 33 U.S.C. § 1319(c).

<sup>462</sup> Except as otherwise provided in FAR 23.104, executive agencies may not enter into, renew or extend contracts with firms listed by the EPA as "violating facilities" under CAA or CWA. FAR 23.103(b) [FAC 90-4].

domestic sources<sup>463</sup>. Others seek to enhance opportunities for minority businesses<sup>464</sup>. A recent change to the Executive branch's procurement policy requires the acquisition and use of environmentally-sound, energy-efficient products and services<sup>465</sup>.

Some of these programs place obligations on bidders or offerors to declare that they will comply with these programs. For instance, contractors must certify that they will comply with "equal opportunity" statutory requirements<sup>466</sup>. Another example is that solicitations may require the prospective contractors to develop and file an affirmative action plan<sup>467</sup>. In acquisitions that exceed \$1 million, the CO must

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<sup>463</sup> eg. Buy American Act, 41 U.S.C. §§ 10a et seq. (1988); FAR Subpart 25.1. See Nash & Cibinic, supra note 182, at 942, 968.

<sup>464</sup> The "8(a)" program. 15 U.S.C. § 637(a) (1990); See also Exec. Order No. 12432 (1983).

<sup>465</sup> OFFICE OF FEDERAL PROCUREMENT POLICY Policy Letter 92-4, 57 Fed. Reg. 53,362 (9 Nov. 1992). The Policy Letter took effect in December 1992. See also Draft OFPP Policy Letter 92-4, 57 Fed. Reg. 10,194 (24 Mar. 1992). The final version of the OFPP Policy Letter includes provisions for price preferences for those products containing recycled materials versus those products that do not contain recycled materials. OFPP Policy Letter 92-4 applies to construction projects as well. It may influence the selection of remediation contractors. However, it is unclear how the policy will be implemented in those projects. Additional guidance will probably have to await the incorporation of the provisions in the FAR, which is due in mid-1993.

<sup>466</sup> FAR 22.805.

<sup>467</sup> FAR 52.222-22; FAR 52.222-25; Waste Management of Greater Washington, B-237928, Dec. 15, 1989, 89-2 CPD ¶ 559; Westinghouse Electric Corp., B-228140, Jan. 6, 1988, 67 Comp. Gen. 178 (1988), 88-1 CPD ¶ 6.

obtain pre-award clearances from the Department of Labor for equal opportunity compliance prior to award<sup>468</sup>. Generally, these requirements do not generate much controversy. However, it is conceivable that socio-economic policies may come into direct conflict with the effort to select responsible environmental contractors<sup>469</sup>.

## 8. TENACITY AND PERSEVERANCE

A prospective contractor's past failure to apply sufficient tenacity and perseverance to perform acceptably is strong evidence of nonresponsibility<sup>470</sup>. An apparent awardee may appear to have the ability to perform, but may lack the will to fulfill its contractual duty. Tenacity and

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<sup>468</sup> FAR 22.805.

<sup>469</sup> In situations where the agency has inserted factors of responsibility into the evaluation criteria, the competing offerors will be ranked in accordance with their technical scores (which may reflect their comparative past performance, experience, financial resources). This could put small businesses (with a smaller capital base, less experience on big projects, and generally a smaller workforce) at a comparative disadvantage in the evaluation process. Should the agency disregard the socio-economic policies and award to the larger firm which was ranked as the "most responsible", when other evaluation factors are equal? Or, does the agency forgo the "more responsible" firm to satisfy the collateral policy of assisting small businesses? Should the government's legitimate desire to avoid the potential liability for the acts of nonresponsible environmental contractors outweigh the policy of assisting new firms to enter the market (in an effort to generate more competition)? With such a clash of policies, clarification and guidance is clearly needed.

<sup>470</sup> FAR 9.104-3(c) [FAC 84-38, FAC 83-39, FAC 90-8]; Firm Reis GmbH, B-224546, B-224544, Jan. 20, 1987, 87-1 CPD ¶ 72.

perseverance, unlike possession of adequate equipment or financial resources, are subjective qualities and must be evaluated using some objective criteria that indicates the lack of will. Often the manifestation of the lack of tenacity and perseverance is, itself, an independent basis for nonresponsibility.

A contractor's lack of tenacity and perseverance is seldom, if ever, relied upon by COs as the sole basis for a nonresponsibility determination. Rather it is usually, if not always, used and cited along with other elements of responsibility<sup>471</sup>. In Campbell Industries<sup>472</sup>, the CO cited the contractor's lack of tenacity and perseverance on three prior U.S. Navy contracts for the same type of work as called for in the pending contract. The evidence offered to show the contractor lacked the will to perform included poor performance, lack of subcontractor control, poor management and untimely performance, any of which is an independent basis for a determination of nonresponsibility. The GAO noted that the Campbell Industries' record of performance was so poor it would have supported the nonresponsibility on its own<sup>473</sup>.

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<sup>471</sup> See Consolidated Airborne Systems, B-183293, Dec. 16, 1975, 55 Comp. Gen. 571 (1975), 75-2 CPD ¶ 395; Comp. Gen. Dec. B-171729, 51 Comp. Gen. 288 (Nov. 10, 1971); Comp. Gen. Dec. B-166969, 49 Comp. Gen. 139 (Sep. 2, 1969); Comp. Gen. Dec. B-168917, 49 Comp. Gen. 600 (Mar. 18, 1969).

<sup>472</sup> B-238871, July 3, 1990, 90-2 CPD ¶ 5.

<sup>473</sup> Id.

Similarly, in the GAO decision of Leslie & Elliot Co., Inc.<sup>474</sup>, the GAO upheld a nonresponsibility determination, citing lack of tenacity and perseverance based upon a three year history of inadequate and unsatisfactory performance, lack of an adequate number of site superintendents<sup>475</sup>, and deficiencies in meeting the schedules.<sup>475</sup>

It appears that "tenacity and perseverance" are often used as a catch-all category by the CO when a pattern of problems is so pervasive that there is little to indicate the contractor can or will be able to fix it. It seems to be a measure of intangibles. The lack of tenacity and perseverance will be upheld or rejected based upon the objective evidence supporting the CO's finding.

#### F. SPECIAL STANDARDS OF RESPONSIBILITY

Indicators of responsibility may be more specifically defined in the invitation for bids (IFB) by including special standards of responsibility, sometimes referred to as "definitive performance criteria". These special standards may be desirable when experience has demonstrated that unusual expertise or specialized facilities are needed for adequate performance. The special standards must be articulated fully

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<sup>474</sup> B-237192, B-237190, Jan. 24, 1990, 90-1 CPD ¶ 100.

<sup>475</sup> See also Fund For Equal Access to Society, E-228167, Jan. 20, 1988, 88-1 CPD ¶ 54; District 2, Marine Engineers Beneficial Assoc., B-181265, Nov. 27, 1974, 74-2 CPD ¶ 298.

in the solicitation, identified as special standards, and must be applied to all offerors<sup>476</sup>.

The definitive criteria are necessary to assure satisfaction of the government needs<sup>477</sup> and must be specific, objective and mandatory<sup>478</sup>. To the extent past performance criteria are being used to evaluate the reliability of the offeror and its capability of performing the contract, the technical evaluation will encompass factors that are traditionally matters of responsibility<sup>479</sup>, the key distinction being whether the requisite experience is a precondition to receiving the award<sup>480</sup>. Generally, affirmative determinations are not readily reviewed by GAO,

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<sup>476</sup> FAR 9.104-2(a).

<sup>477</sup> Topley Realty Co., B-221459, Apr. 23, 1986, 65 Comp. Gen. 511 (1986), 86-1 CPD ¶ 398; Software City, B-217542, Apr. 26, 1985, 85-1 CPD ¶ 475; Watch Security, Inc., B-209149, Oct. 20, 1982, 82-2 CPD ¶ 353; Haughton Elevator Div., Reliance Electric Co., B-184865, Mar. 3, 1976, 55 Comp. Gen. 1051 (1976), 76-1 CPD ¶ 294; International Computaprint Corp., B-185403, Apr. 29, 1976, 55 Comp. Gen. 1043 (1976), 76-1 CPD ¶ 289.

<sup>478</sup> FAR 9.104-2(a); Weldtest, B-216747.2, Dec. 3, 1984, 84-2 CPD ¶ 612; Old Dominion Security, B-216534, Jan. 22, 1985, 85-1 CPD ¶ 78; Alliance Properties Inc., B-214769, July 3, 1984, 84-2 CPD ¶ 14; J. Baranello & Sons, B-192221, May 9, 1979, 58 Comp. Gen. 509 (1979), 79-1 CPD ¶ 322.

<sup>479</sup> FAR 9.104-1(c); J & J Maintenance, Inc., B-251355, B-251355.4, May 7, 1993, 93-1 CPD ¶ \_\_\_; McLaughlin Research Corp., B-247118, May 5, 1992, 71 Comp. Gen. 383 (1992), 92-1 CPD ¶ 422; RMS Industries, B-247229, B-247794, May 19, 1992, 92-1 CPD ¶ 451; Sanford & Sons, Co., B-231607, Sep. 20, 1988, 68 Comp. Gen. 266 (1988), 88-2 CPD ¶ 266.

<sup>480</sup> Lebanon Publishing Co., Inc., B-243149, Apr. 24, 1991, 91-1 CPD ¶ 406; Victaulic Co. of America, B-217129, May 6, 1985, 85-1 CPD ¶ 100.

one of the explicit exceptions occurring where the solicitation contains definitive responsibility criteria<sup>481</sup>. The CO's discretion is not without limitations. Although evaluation of responsibility factors is a matter of judgment of the agency, the CO must be able to demonstrate with objective evidence that the offeror/bidder complied with the definitive responsibility criteria<sup>482</sup>.

Action Service Corp.<sup>483</sup> provides a good example of criteria that were not sufficiently specific. The agency's solicitation simply listed generic criteria such as basic knowledge and understanding of work to be performed, experience in similar work, ability to meet the schedule, and a good record of performance. The GAO stated such basic factors were not definitive responsibility criteria, but merely responsibility considerations. Similarly, general statements of experience are not definitive responsibility criteria if they do not establish specific qualitative and quantitative standards<sup>484</sup>.

Definitive responsibility criteria should be

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<sup>481</sup> 4 C.F.R. § 21.3(m)(5) (1991).

<sup>482</sup> Vulcan Engineering Co., B-214595, Oct. 12, 1984, 84-2 CPD ¶ 403; AMPEX Corp., B-212356, Nov. 15, 1983, 83-2 CPD ¶ 565; Power System, B-210032, Aug. 23, 1983, 83-2 CPD ¶ 232.

<sup>483</sup> B-246413, B-246413.2, Mar. 9, 1992, 92-1 CPD ¶ 267.

<sup>484</sup> Teltara, Inc., B-245806.2, Apr. 14, 1992, 92-1 CPD ¶ 363; CVD Equipment, Co., B-237637, Mar. 8, 1990, 90-1 CPD ¶ 259; Patterson Pump Co., B-204694, Mar. 24, 1982, 82-1 CPD ¶ 279. Compare Roth Brothers, Inc., B-235539, Aug. 2, 1989, 89-2 CPD ¶ 100.



distinguished from the specification criteria. If a requirement addresses "how" the work is to be performed, rather than whether the prospective contractor is presently capable and willing to do the work, it is treated as a specification requirement<sup>485</sup>. It may seem obvious in a negotiated procurement that responsibility related factors included in a solicitation as technical evaluation criteria are not definite responsibility criteria<sup>486</sup>.

One of the more common special standards is experience. The prospective contractor may be required to show that it has a specified number of years of experience in performing the same type of work or similar work as requested in the solicitation<sup>487</sup>. When examining whether an offeror/bidder has the requisite experience, the CO may look beyond the literal criteria. For instance, a firm younger than the experience standard in the solicitation may demonstrate its

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<sup>485</sup> Power Testing, Inc., B-197190, Jan. 28, 1980, 80-2 CPD ¶ 72; Markhurd Aerial Surveys, Inc., B-210108, Jan. 17, 1983, 83-1 CPD ¶ 51; Biospherics, Inc., B-203419, Dec. 31, 1981, 81-2 CPD ¶ 518.

<sup>486</sup> Unison Transformers Services, Inc., B-232434, Nov. 10, 1988, 68 Comp. Gen. 74, 88-2 CPD ¶ 471.

<sup>487</sup> Vulcan Engineering Co. v. United States, 16 Cl. Ct. 84 (1988); Modern Sanitation System, Corp., B-245469, Jan. 2, 1992, 92-1 CPD ¶ 9; Bender Shipbuilding & Repair Co., Inc., B-219629.2, Oct. 25, 1985, 85-2 CPD ¶ 462; American Sterilizer Co., B-207518, Nov. 17, 1982, 82-2 CPD ¶ 453; Karl Doll GmbH, B-213556, June 6, 1984, 84-1 CPD ¶ 604; Urban Masonry Corp., B-213196, June 3, 1984, 84-1 CPD ¶ 48; R.R. Mongeau Engineers, Inc., B-213330, Mar. 20, 1984, 84-1 CPD ¶ 333; Proficiency Associates, Inc., B-198844.2, Jan. 19, 1981, 81-1 CPD ¶ 29. Contrast ECI Construction, Inc., B-250630, Oct. 9, 1992, 92-2 CPD ¶ 239.

capability by highlighting the relevant experience of its employees and officers<sup>488</sup>. Examples of special standards in the environmental construction or services fields would include a requisite number of years' experience monitoring asbestos abatement projects<sup>489</sup>, removing and transporting PCBs<sup>490</sup>, and experience in support services related to the EPA's Superfund program<sup>491</sup>.

A key distinction must be made between the experience of the bidder, which is a matter of responsibility, and the performance of a product, which is a matter of responsiveness<sup>492</sup>. Sometimes the distinction between them is subtle. In American Sterilizers<sup>493</sup>, for instance, the GAO held that the requirement to list three biohazardous facilities where the contractor's sterilizers were in use was a responsibility, not a responsiveness, issue. According to the GAO, the challenged clause in American Sterilizer related to experience of the bidder, not the successful performance of

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<sup>488</sup> J.D. Miles & Sons, B-251533, Apr. 7, 1993, 93-1 CPD ¶ 294; Haughton Elevator Div., Reliance Electric Co., B-184865, May 3, 1976, 76-1 CPD ¶ 294.

<sup>489</sup> Apex Environmental, Inc., B-241750, Feb. 25, 1991, 91-1 CPD ¶ 209.

<sup>490</sup> Unison Transformer Service, Inc., B-232434.2, Nov. 30, 1988, 88-2 CPD ¶ 539.

<sup>491</sup> Cadmus Group, Inc., B-241372.3, Sep. 25, 1991, 91-2 CPD ¶ 271.

<sup>492</sup> E.C. Campbell, Inc., B-203581, Oct. 9, 1981, 81-2 CPD ¶ 295.

<sup>493</sup> B-207518, Nov. 17, 1982, 82-2 CPD ¶ 453.

the item. Whether the contractor can do the work is a responsibility matter and can be demonstrated prior to award. Whereas performance of the product focuses on whether the product meets the minimal acceptable standards set out in the solicitation and is therefore a responsiveness issue; failure to do so results in rejection of the bid.

Generally, the prospective contractor itself must have the requisite experience. In some decisions, it was sufficient for the contractor to show that the experience was obtainable via association with the parent corporation or via purchase of an experienced rival firm<sup>494</sup>. Likewise, the requirement may be met by relying on the experience of a subcontractor<sup>495</sup>.

Restec Contractors, Inc.<sup>496</sup> provides a good example of the use of definitive responsibility criteria in a source selection for environmental services. There, the GAO upheld the requirement for the awardee to have three similar asbestos abatement contracts within the last three years. Similarly, in BBC Brown Boveri, Inc.<sup>497</sup> the protester challenged the award, alleging the prospective awardee failed to show it had the requisite five years experience servicing and dismantling

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<sup>494</sup> J.D. Miles & Sons, B-251533, Apr. 7, 1993, 93-1 CPD ¶ 587; Hardie-Tynes Mfg., Co., B-237938, Apr. 2, 1990, 90-1 CPD ¶ 587.

<sup>495</sup> BBC Brown Boveri, Inc., B-227903, Sep. 28, 1987, 87-2 CPD ¶ 309.

<sup>496</sup> B-245862, Feb. 6, 1992, 92-1 CPD ¶ 154.

<sup>497</sup> B-227903, Sep. 28, 1987, 87-2 CPD ¶ 309.

PCB transformers. The GAO treated the requirement as a responsibility issue, stating it would only check to see if the CO had sufficient evidence to conclude the definitive responsibility criteria had been met. By contrast, the GAO found the experience requirements in Keeson, Inc.: Ingram Demolition, Inc.<sup>498</sup> too restrictive. There, the solicitation provision required offerors to have completed five asbestos projects in the last three years and five years of an established asbestos abatement business. GAO objected to the additional requirement of five years in the business as redundant and unnecessary.

Provisions requiring the submission of business references may be used as definitive responsibility criteria<sup>499</sup>. But a mere requirement to list references without any explanation as to how and why the data will be evaluated does not constitute a standard that can be reviewed objectively<sup>500</sup>. The key is, for what purpose will the business reference be used? Similarly, having adequate working capital, a traditional responsibility element, has been successfully used as a definitive responsibility criterion<sup>501</sup>.

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<sup>498</sup> B-245625, B-245655, Jan. 24, 1992, 92-1 CPD ¶ 108.

<sup>499</sup> Ampex Corp., B-212356, Nov. 15, 1983, 83-2 CPD ¶ 565.

<sup>500</sup> MDT Corp., B-236903, Jan. 22, 1990, 90-1 CPD ¶ 81; Management Engineer Inc., KLD Assoc., Inc., B-233085, B-233085.2, Feb. 15, 1989, 89-1 CPD ¶ 156.

<sup>501</sup> Prime Mortgage Corp., B-238680.2, July 18, 1990, 69 Comp. Gen. 618 (1990), 90-2 CPD ¶ 48.

Ownership of, or access to, special facilities has been used as a definitive responsibility criterion in nonenvironmental acquisitions<sup>502</sup>. Accessibility to hazardous waste disposal facilities could be of some use as a definitive responsibility criterion in environmental contracts. However, there are other ways, which would probably be more effective, for the contracting agency to assure compliance with the agency's special needs<sup>503</sup>.

Solicitations routinely advise the bidders to have all necessary permits and certifications to successfully complete the contract. The GAO has been reluctant to treat permits and licenses as definitive responsibility criteria<sup>504</sup>. In Restec Contractors, Inc.<sup>505</sup> the GAO found that the requirement for the offeror to be certified by the state in order to perform asbestos work is a contract performance requirement, not a definitive responsibility criterion, where possession of the

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<sup>502</sup> Aero Corp., B-201581, May 4, 1981, 81-1 CPD ¶ 338; Auto Discount Rent-N-Drive Systems, Inc., B-197236, July 28, 1980, 80-2 CPD ¶ 73.

<sup>503</sup> As discussed generally infra at Part III.G the CO could list accessibility to hazardous waste incinerators or hazardous waste disposal facilities as a technical evaluation criterion in the RFP. Or, where laws, statutes or local ordinances require the destination of the waste to be identified, the CO could require the offerors/bidders to specify the location in the offer/bid. See infra at Part III.E.7.

<sup>504</sup> Windward Moving & Storage Co., Inc.--Recon., B-247558.3, Mar. 31, 1992, 92-1 CPD ¶ 326. Cf. Aero Systems, Inc., B-215897, Oct. 1, 1984, 84-2 CPD ¶ 374.

<sup>505</sup> B-245862, Feb. 6, 1992, 92-1 CPD ¶ 154.

certificate was not required before performance began<sup>506</sup>.

As noted infra at Part III.C, the GAO will not normally review affirmative responsibility determinations. However, the GAO will review the CO's determinations whenever the solicitation contains definitive responsibility requirements<sup>507</sup>.

Definitive responsibility criteria are controversial because they restrict or limit the class of offerors to those meeting these special standards. Definitive responsibility criteria are often disfavored means of ensuring responsible competitors. By placing special standards of responsibility in the solicitation, the contracting agency limits the class of offerors, intentionally or otherwise, to those capable of meeting qualitative or quantitative specifications<sup>508</sup>. If competition acts to drive prices down, any action to decrease competition will likely lead to higher prices. Similarly, efforts that decrease competition will no doubt be viewed unfavorably by the Legislative branch.

#### G. RESPONSIBILITY AS A TECHNICAL EVALUATION FACTOR

Evaluation of a prospective contractor's past performance

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<sup>506</sup> See also IBI Security Services, Inc., B-240495.2, Feb. 28, 1991, 91-1 CPD ¶ 241.

<sup>507</sup> 4 C.F.R. § 21.3(m)(5) (1991).

<sup>508</sup> Ampex, Inc., B-212356, Nov. 15, 1983, 83-2 CPD ¶ 565; A. R. & S. Enterprises, Inc., B-201924, July 7, 1981, 81-2 CPD ¶ 14.

as a technical evaluation criterion in a competitive negotiation is different from determining the responsibility of an awardee in a sealed bid acquisition. As explained previously at infra Part III.B.1, in a sealed bid acquisition the CO makes a responsibility determination, after identification of the low priced bid, using a pre-award survey and/or other sources. The responsibility determination is accomplished to see if the prospective contractor meets the minimum level of responsibility. Whereas, in source selections using competitive proposals, elements of responsibility may be evaluated in the source selection process and once the prospective awardee is tentatively identified, the CO may still examine the awardee's responsibility. When used as an evaluation criterion, responsibility is not a "go" / "no go" decision. The SSET evaluates and grades the offeror's proposal against the evaluation criterion. Where that criteria includes elements of responsibility, the offeror must submit in its proposal supportive evidence to demonstrate that it meets the criterion. If the proposal requires clarification, or has a deficiency, the offeror can submit additional evidence prior to the best and final offer (BAFO)<sup>509</sup>.

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<sup>509</sup> During the 1980s and into the 1990s there has been an increasing use of "risk assessment" in competitive negotiations. In these acquisitions the government categorized elements of responsibility relating to past and present performance as "risk assessment" evaluation criteria. The RFP will list, along with the traditional major criteria of technical evaluation and cost, a category called "risk assessment". When "risk assessment" is used a category of

In a procurement utilizing negotiated proposals/ competitive negotiation, traditional responsibility may be used as a technical evaluation criterion<sup>510</sup>. However, there must be a valid government need to include these traditional responsibility elements in the evaluation process. The GAO has consistently stated that the elements of responsibility may be used as source selection criteria only if the circumstances warrant a comparative assessment of those areas<sup>511</sup>. Other traditional indicators of responsibility, in

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evaluation criteria it is usually comprised of several elements of responsibility, with past performance as the most common factor. In contract, in acquisitions where "risk assessment" is not used, the elements that would otherwise be put in the risk assessment category would be included in the overall evaluation. As such, use of the "risk assessment" as a separate category does not alter the basic evaluation process performed by the source selection evaluation team (SSET). Risk has routinely been a consideration relating to the evaluation process in source selections. Teledyne Ryan Aeronautical, B-187325, May 20, 1977, 56 Comp. Gen. 635 (1977), 77-1 CPD ¶ 352. When effectively used, "risk assessment" can assist in clarifying the SSET's evaluation and their articulation of the team's recommendation by separating the evidence of the prospective contractor's willingness & capability from the technical evaluation. See generally JB Industries, B-251118, B-251118.2, April 6, 1993, 93-1 CPD ¶ \_\_\_\_; Symetrics Industries, Inc., B-250519, B-250519.2, Mar. 25, 1993, 93-1 CPD ¶ \_\_\_\_; Booz, Allen, & Hamilton, Inc., B-249236, B-249236.5, Mar. 5, 1993, 93-1 CPD ¶ \_\_\_\_; Ameriko Maintenance Co., B-250786, Feb. 16, 1993, 93-1 CPD ¶ \_\_\_\_\_. But, analysis of risk based on past performance cannot be used as a unweighted "general consideration" by an agency to shift an award away from one offeror towards another on the basis of factors not otherwise properly listed in the RFP. H.J. Group Ventures, Inc., B-246139, Feb. 19, 1992, 92-1 CPD ¶ 203; Laser Power Techs., Inc., B-233369, Mar. 13, 1989, 89-1 CPD ¶ 267.

<sup>510</sup> Pacific Computer Corp., B-224518.2, Mar. 17, 1987, 87-1 CPD ¶ 292.

<sup>511</sup> Modern Sanitation Systems, Corp., B-245469, Jan. 2, 1992, 92-1 CPD ¶ 9; Clegg Industries, Inc., B-242204.3, Aug. 14, 1991, 70 Comp. Gen. 679 (1991), 91-2 CPD ¶ 145; Flight



addition to past performance, may be used as technical evaluation criteria. These include: management capability<sup>512</sup>, availability of necessary production equipment<sup>513</sup>, and specific corporate experience for use in the evaluation process<sup>514</sup>.

Performance of the offerors on previous projects is perhaps the most common application of traditional

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Int'l Group, Inc., B-238953.4, Sep. 28, 1990, 69 Comp. Gen. 741 (1990), 90-2 CPD ¶ 257; Sanford & Sons, Co., B-231607, Sep. 20, 1988, 67 Comp. Gen. 612 (1988), 88-2 CPD ¶ 266; Computer Services Corp., B-186950, Dec. 21, 1976, 76-2 CPD ¶ 511.

<sup>512</sup> VR Environmental Services, B-246917, Apr. 15, 1992, 71 Comp. Gen. 354 (1992), 92-1 CPD ¶ 370. VR Environmental is an interesting case. DLA used traditional responsibility type criteria in its source selection for a hazardous waste transportation and disposal. VR Environmental's proposal was found to be technically unacceptable. Specifically, the agency found that the protester "lacked management capability", as demonstrated by its inability to document requisite environmental and safety training of employees, its inability to demonstrate compliance with labor or environmental laws and regulations, and its inability to document the specific nature of the work performed on its previous hazardous waste disposal contracts. The GAO upheld the finding that VR Environmental was technically unacceptable. From the limited information in the GAO decision it seems reasonable that the protester could have been found technically unacceptable or nonresponsible on a number of bases. Since VR Environmental was a small business the agency did not have to refer the matter to the SBA where the basis for rejection was technical unacceptability, as opposed to nonresponsibility. See generally infra at Part III.A.5.

<sup>513</sup> Joanell Laboratory, Inc.--NuWay Mfg. Co., Inc., B-242-415.8, et al., Apr. 15, 1992, 71 Comp. Gen. \_\_\_\_ (1992), 92-1 CPD ¶ 369.

<sup>514</sup> Engineering Management Resources, Inc., B-248866, Sep. 29, 1992, 92-2 CPD ¶ 217. The protester was properly rejected as technically unacceptable because its staff did not have the minimal years of specified military operational experience required in the RFP. See also BENMOL Corp., B-251586, April 16, 1993, 93-1 CPD ¶ \_\_\_\_.

responsibility-type factors as evaluation criterion in competitive negotiations. Past performance evaluations attempt to specify the degree of risk associated with each contractor by looking at each offeror's record on previous contracts<sup>515</sup>. Evaluation of past performance can be a double edged sword for the offeror. An exemplary record of performance may enhance the offeror's scores. On the other hand, a poor record of performance will probably reflect poorly on the offeror's proposal. Where the offeror is found deficient under the criteria in an RFP, the matter is one of acceptability, not responsibility.

In Corvac, Inc.<sup>516</sup> the Defense Logistics Agency issued a request for proposals (RFP) for the removal, transportation, and disposal of hazardous wastes at a U.S. Navy installation in Texas. The RFP listed two evaluative criteria: price and past performance. The past performance criterion was subdivided into subcriteria: conformance with specifications and standards of good workmanship, adherence to contract schedules, and upholding the offeror's reputation for reasonableness and cooperation with its customers, along with a businesslike concern for the interest of the customer. Corvac had the second lowest priced proposal and was only

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<sup>515</sup> Philip G. Bail, Jr., "Best Value" Procurement For Hazardous Waste and Remediation Services, Contract Management, April 1993, at 22; Dominic A. Femino, Evaluating Past Performance, The Army Lawyer, (DA PAM 27-50-196 April 1989), at 25.

<sup>516</sup> B-244766, Nov. 13, 1991, 91-2 CPD ¶ 454.

marginally acceptable due to its poor performance as incumbent on the prior contract for the same services. Corvac submitted a protest to the GAO challenging its past performance assessment. The GAO upheld the CO's ranking of the offers, stating that the CO had adequate evidence to support the evaluation. The evidence supporting the downgrading of Corvac's proposal indicated that of 81 pickups, the offeror/incumbent had problems on 34. The problems included improper and incorrect entries on hazardous waste manifests, lost manifests, lost or misplaced drums of hazardous waste, and improper mixing of hazardous wastes, thereby exposing the government to potential liability under RCRA. Corvac blamed its subcontractors, however, GAO said it was not unreasonable to attribute the subcontractors' problems to the prime contractor. The GAO agreed with the CO that Corvac's performance as the incumbent had established a pattern of poor behavior, justifying its marginal score on the technical evaluation of its proposal<sup>517</sup>.

Another example of using past performance as an evaluation criterion is Federal Environmental Services, Inc.<sup>518</sup>, where the Defense Reutilization and Marketing Service (DRMS) awarded a contract for removal, transportation, and disposal of hazardous waste generated at various military

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<sup>517</sup> Id.; See also Legal Developments - Environment, 56 Fed. Cont. Rpt. (BNA) 790 (9 Dec. 1991).

<sup>518</sup> B-250135.4, May 24, 1993, 93-1 CPD ¶ \_\_\_\_.

facilities near Charleston, South Carolina to Laidlaw-GS.<sup>519</sup> The selection process evaluated price and past performance of those proposals determined to be technically acceptable. Federal Environmental Services, Inc. (FESI) protested the award to Laidlaw-GS. FESI's score on past performance was originally rated even with Laidlaw-GS. It was downgraded by the Source Selection Authority after the submission of BAFOs. The basis for this downgrading was the new evidence concerning FESI's past performance on two hazardous waste disposal contracts that came to light during the post-award survey. Among the problems with FESI's past performance noted by the agency were: improperly labelling and handling of drums containing hazardous waste; repeated inaccurate entries on the manifests; mishandling the manifests; tardy pick-ups of hazardous wastes; several safety violations; improper mixing of waste types; and a demonstrated lack of technical expertise to comply with the relevant regulations and contract terms concerning handling, transport, and disposal of hazardous wastes. FESI contended that its problems on the two contracts were merely "paperwork" deficiencies. The GAO sharply rejected this contention, noting that the requisite manifest documentation is the foundation for evaluating and containing a potential hazard in the event of a hazardous waste spill. Since Congress mandated the use of the tracking system, the

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<sup>519</sup> The awardee's price of \$3.75 million was more than \$600,000 higher than Federal Environmental Services, Inc.'s BAFO.

GAO noted, it is not for the contractor to determine that the documentation requirements are trivial. The GAO denied FESI's protest, concluding that FESI's multiple failures to comply with this tracking system provided a reasonable basis to downgrade FESI's past performance rating<sup>520</sup>.

Untimely performance on past Federal contracts, another relevant responsibility factor, can also be used as a technical evaluation criterion. In the GAO decision of Kings Point Industries, Inc.<sup>521</sup> the protester/offeror complained that the technical evaluation of its past performance was improper. The GAO disagreed, noting that the CO had documented the protestor's history of serious delinquencies in five of eleven Federal contracts over the previous three years.

In some instances the offerors are required to submit business references with their proposal for consideration as an evaluation criterion. When this happens, the references submitted are for their probative value regarding the offeror's past performance<sup>522</sup>. Often the information obtained from interviews with those used as references raises

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<sup>520</sup> B-250135.4, May 24, 1993, 93-1 CPD ¶ \_\_\_\_.

<sup>521</sup> B-249616, Dec. 7, 1992, 92-2 CPD ¶ 395.

<sup>522</sup> RMS Industries, B-247229, B-247794, May 19, 1992, 92-1 CPD ¶ 451; Ferranti Int'l Defense Systems, Inc., B-237555, Feb. 27, 1990, 90-1 CPD ¶ 239.

doubts about the offeror's responsibility<sup>523</sup>. In these cases, the contracting agency used the references submitted by an offeror as a means to solicit comments, favorable or otherwise, concerning the offeror's past performance. Positive and negative comments are considered in the comparative evaluation of the competing proposals. The information solicited from the references may be of limited value since it may be subjective, but it may provide the agency a source of information relevant to an evaluation criterion.

One of the consequences of using traditional responsibility as a technical evaluation criterion is that on protest, the GAO may take a hard look to determine whether the agency properly evaluated the proposals. In Northwest Enviro Service, Inc.<sup>524</sup> the GAO found that the DLA's evaluation was arbitrary. The DLA conducted a competitive source selection

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<sup>523</sup> In George A. & Peter A. Palivos, B-245878, et al., Mar. 16, 1992, 92-1 CPD ¶ 286, members of the source selection evaluation team interviewed Palivos' references and found that the offerors had a long history of troubled performance as landlords to the Government. Disputes on prior contracts over repairs, leaking roofs, collapsed ceilings, sunken floors, habitability of the buildings, inaccessibility of the landlords and the landlords' consistent failure to take timely corrective action were considered in the evaluation of Palivos' proposal and their comparative evaluation suffered accordingly vis-a-vis their competitors. The GAO noted that the Palivos Brothers were not disqualified from competing for the pending contract. Rather, their proposal was properly and reasonably evaluated in light of the available information, which included information gleaned from the references they provided to the SSET.

<sup>524</sup> B-247380.2, July 22, 1992, 71 Comp. Gen. \_\_\_\_ (1992), 92-2 CPD ¶ 38.

for removal, transportation, and disposal of PCBs from various sites in Alaska. The incumbent protested the award to another firm, alleging that DLA failed to properly evaluate the proposals. The only criteria were price and past performance, in that order of priority. The past performance criterion was composed of numerous subcriteria that focused on timely performance, administration, reputation for reasonableness and cooperation, and commitment to customer satisfaction. All three proposals were graded as essentially equal. The GAO sustained the protest, in part, because the source selection evaluation team treated the other two offerors unfairly. While the SSET went into depth in evaluating the past performance of two of the proposals, evaluation of the awardee's past performance was cursory and undocumented. The evaluators ignored a possible integrity problem with one of the awardee's managers. The SSET's conclusion that the awardee had no problems was based more on conjecture than on any evidence before the evaluation<sup>525</sup>.

As an aside, a small business competing in a negotiated procurement, where traditional responsibility is used as an evaluation factor, complicates the use of responsibility as a technical evaluation factor. A small business may not be found technically unacceptable under an evaluation criterion that measures a traditional responsibility factor unless the agency performed a proper relative assessment of competing

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<sup>525</sup> Id.

proposals under the criterion, or unless the matter was ultimately referred to the SBA for a responsibility determination<sup>526</sup>. While traditional responsibility factors may be used as technical evaluation criteria in a negotiated acquisition, the factors may be used only if circumstances warrant a comparative evaluation of those areas<sup>527</sup>. Otherwise, an agency would be determining the responsibility

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<sup>526</sup> In VR Environmental Services, B-246917, Apr. 15, 1992, 71 Comp. Gen. 354, 92-1 CPD ¶ 370, the protester was rejected as technically unacceptable for a hazardous waste removal and transport contract with the Defense Logistics Agency. The SSET found the protester failed: i. to assure compliance with Federal training requirements for hazardous waste handling, ii. to demonstrate its ability to perform in the allotted time, iii. to submit references of comparable experience, and iv. to submit evidence of established working relationships with acceptable disposal facilities and transporters. The GAO found that the requirements were not traditional responsibility-type factors. Compliance with those requirements were a prerequisite to a determination of technical responsibility. So, no referral to the SBA was required in this situation. In Janel Tohm, B-246577, Mar. 19, 1992, 71 Comp. Gen. 314, (1992), 92-1 CPD ¶ 295, the GAO sustained a protest where the small business, low-priced bidder/protester was declared nonresponsive for failure to submit with her bid a New Mexico contractor license number. The GAO held that the requested number was a matter of responsibility and should have been referred to the SBA. In Clegg Industries, Inc., B-242204.3, Aug. 14, 1991, 70 Comp. Gen. 679 (1991), 91-2 CPD ¶ 145; the protester was excluded from the competitive range because it lacked experience in the work being solicited. The GAO sustained the protest finding that the agency had used "experience" as a de facto responsibility finding. Similarly, in Federal Support Corp., B-245573, Jan. 16, 1992, 71 Comp. Gen. 152 (1992), 92-1 CPD ¶ 81, the protester's offer was rejected as technically unacceptable based upon the U.S. Air Force's perception that FSC lacked "corporate experience". The GAO sustained the protest, finding that the experience factor in this solicitation was really a matter of responsibility and referral to the SBA was, therefore, required.

<sup>527</sup> CORVAC, Inc., B-244766, Nov. 13, 1991, 91-2 CPD ¶ 454; Flight Int'l Group, Inc., B-238953.4, Sep. 28, 1990, 90-2 CPD ¶ 257; Pacific Computer Corp., B-224518.2, Mar. 17, 1987.



of an offeror under the guise of making a technical evaluation of proposals<sup>528</sup>. Under such circumstances, "technically unacceptable" is equivalent to a finding of nonresponsibility, which is in the purview of the SBA.

Another application of responsibility as a technical evaluation criteria in the procurement of environmental work that is closely associated with small businesses is the Simplified Acquisition of Base Engineering Requirement (SABER) program in the Air Force.<sup>529</sup> The SABER program relies on competitively negotiated firm, fixed price, indefinite delivery, indefinite quantity type contracts for minor renovation and construction-related services at individual bases or facilities<sup>529</sup>. A SABER-style contract is procured using an RFP which requires evaluation of various elements of responsibility, including the offeror's management ability, company experience, and subcontractor support capability. Projects are tasked by the contracting office to the SABER-

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<sup>528</sup> Federal Support Corp., B-245573, Jan. 13, 1992, 71 Comp. Gen. 152 (1992), 92-1 CPD ¶ 81, at 4.

<sup>529</sup> AFR 70-30 (1988); DFARS 219.502-72 (DAC 88-13); DFARS 219.10 (DAC 88-13). See generally H.J. Group Ventures, Inc., B-246139, B-246139.3, Aug. 21, 1992, 92-2 CPD ¶ 116; Alpha Building Corp., B-242576, Apr. 23, 1991, 91-1 CPD ¶ 402; HSI-CCEC, B-240610, Dec. 7, 1990, 90-2 CPD ¶ 465; Bildon, Inc., B-243000.3, Nov. 19, 1991, 91-2 CPD ¶ 475; Childers Construction Co., B-243379, B-243379.2, Sep. 27, 1991, 91-2 CPD ¶ 300; Veco/Western Alaska Construction, B-243978, Sep. 9, 1991, 91-2 CPD ¶ 228; John Bowman, Inc., B-239543, Aug. 28, 1990, 90-2 CPD ¶ 165; Beneco Enterprises, Inc., B-243000, June 24, 1991, 70 Comp. Gen. 574 (1991), 91-1 CPD ¶ 574; Beneco Enterprises, Inc., B-239543, B-239543.3, June 7, 1991, 91-1 CPD ¶ 545; Transco Contracting Co., B-228347, B-228347.2, July 12, 1988, 88-2 CPD ¶ 34; Schnorr-Stafford Construction, Inc., B-227323, Aug. 12, 1987, 87-2 CPD ¶ 153.

contractor by individual delivery orders<sup>530</sup>. SABER contractors can be tasked, in appropriate circumstances, to perform the construction-type tasks associated with some aspects of removal or response actions. However, the use of the SABER program is limited by specified monetary ceilings per delivery order and by the fact that SABER-contractors are by design small businesses performing generic construction activities. Therefore, the application of the SABER program to environmental cleanup projects is restricted by the size, scope and expense of the individual sites<sup>531</sup>.

Generally, using responsibility criteria offers a more focused review than the post-bid opening responsibility determination used in the sealed bid process. In the acquisition of environmental contracts, it can afford the contracting agency the opportunity to interject indicators of contractor responsibility into the comparative evaluation of competing proposals. Instead of using a "minimally acceptable" standard for responsibility, as is done in sealed bidding, a prospective contractor's history of past

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<sup>530</sup> The cost of an individual project is computed by adding the unit prices from the pre-priced line items and multiplying the coefficient of the contractor's overhead and profit.

<sup>531</sup> Probably the best application of the SABER program to environmental problems would be where a SABER-style contract is in place at a base or facility that has a release of hazardous waste. Using the SABER-type of contract, the CO could task the contractor to perform emergency "construction" to respond to the immediate need to confine the spill, such as the construction of an earth berm or the sealing of a building.

performance, financial resources, management capability, or other elements of responsibility can be balanced against price and other price related factors.

#### PART IV

#### ALTERNATIVES

If we are to assume that there is some dissatisfaction overall with the CO's current capability to determine a prospective contractor's responsibility, then there are several options that could be considered to enhance the CO's ability to make effective responsibility determinations in procurements for environmental services. These include prequalification of the bidders/offerors, a computerized data bank of environmental services firms' past performance, more extensive use of architect-engineering source selections, and expansion of suspension and debarment for environmental noncompliance. Another alternative is to minimize the need to contract for these services by expanding the organic, or in-house, capability of the DOD to perform environmental remediation projects themselves.

##### A. PREQUALIFICATION OF ENVIRONMENTAL CONTRACTORS

In September 1991, the Defense Environmental Restoration Program Task Force made numerous recommendations to improve

the DERP process. One of the more controversial proposals of the Task Force was their recommendation for establishing a pool of prequalified environmental contractors to support cleanup at DOD installations<sup>532</sup>. Prequalification refers to any process by which a contract agency narrows the range of potential bidders/offerors. It can also refer to the practice of determining prior to evaluation, or award, whose bid or proposal will be eligible for award<sup>533</sup>. In contrast, prequalification or eligibility for award addresses a contractor's responsibility and may focus upon products, processes, contractor experience and other elements of responsibility<sup>534</sup>.

Prequalification has been tried in the past with varying degrees of success. The same criticisms raised against it in the 1970s are echoed today<sup>535</sup>. Its meager measure of success has been limited primarily to the manufacture of components

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<sup>532</sup> DERP Staff Suggests Cleanup Changes In Name of Unhappy Task Force, supra note 36.

<sup>533</sup> Robert E. Lieblich, Bidder Pre-Qualification- A Theory in Search of Practice, 5 Pub. Cont. L. J. 32 (1972).

<sup>534</sup> FAR Subpart 9.2. See also Kenneth M. Jackson, Prequalification & Qualification: Discouragement of New Competitors, 19 Pub. Cont. L. J. 702 (Summer 1990).

<sup>535</sup> Prequalification has been criticized for discouraging new entrants into the market, for adding another onerous bureaucratic hurdle to the process, for creating "goldplated" qualification requirements, for costing more than the minimal benefits obtained, for being limited in application to only supply contracts for components and assemblies, and for delaying the acquisition process. See generally Lieblich, supra note 533; Jackson, supra note 534; Nash & Cibinic, supra note 182, at 250.

and assemblies requiring stringent testing standards<sup>536</sup>. Each effort seems to generate new challenges<sup>537</sup> and one may assume, ill will.

One wonders whether prequalification could even be effectively applied to the issue of responsibility of environmental contractors. Since responsibility is an issue of present capability and willingness to perform, the value of the status of being prequalified is debatable, if it can be undermined by the contractor's previous contract performance, delinquencies caused by its subcontractors, liquidation of its sureties, or a host of other unforeseen circumstances. The premise on which the prequalification was based could be undermined by events virtually in an afternoon.

Yet, this ignores the more significant flaw of prequalification; that is, it restricts competition<sup>538</sup>. CICA provisions require contract agencies to obtain full and open competition<sup>539</sup> through the use of competitive procedures. The dual purpose of maximizing competition being to ensure that a procurement is open to all responsible sources, and to

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<sup>536</sup> Jackson, supra note 534, at 709.

<sup>537</sup> Sturm, Ruger, & Company, Inc., B-235938, Oct. 25, 1989, 89-2 CPD ¶ 375; Rotair Industries, Inc., B-232702, Dec. 29, 1988, 88-2 CPD ¶ 636; Pacific Sky Supply, Inc., B-225531, Mar. 30, 1987, 66 Comp. Gen. 370 (1987), 87-1 CPD ¶ 358.

<sup>538</sup> Lieblich, supra note 533, at 32; Nash & Cibinic, supra note 182, at 250.

<sup>539</sup> FAR 6.001.

provide the Government with fair and reasonable prices<sup>540</sup>. It remains to be seen how prequalification of environmental contractors in one of the fastest growing domestic markets could be reconciled with CICA.

#### B. CENTRAL COMPUTER DATA BASES ON ENVIRONMENTAL CONTRACTORS

A recurring idea in the contracting community is the notion of using a master central data base to collect input from various and diverse contracting agencies regarding contractors' past performances<sup>541</sup>. Under these proposals, data regarding a contractor's past performance on Federal contracts could be compiled, reviewed, submitted for contractor comment or rebuttal, and eventually included in a central data base<sup>542</sup>. This data would then be available for agencies to use in evaluation of a prospective awardee's responsibility or for performance risk analysis. Similar systems have been attempted in the past by the U.S. Corps of

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<sup>540</sup> 10 U.S.C. § 2304(a)(1)(A) (1987). See also Western Roofing Services, B-232666.4, Mar. 5, 1991, 70 Comp. Gen. 323 (1991), 91-1 CPD ¶ 242.

<sup>541</sup> Ralph C. Nash, Jr., Performance Information Systems: Is More Information Better?, 7 N&CR ¶ 6, at 14 (Jan. 1993); Explanatory Text to OFPP Policy Letter 92-5, supra note 393, at 100,653.

<sup>542</sup> Ralph C. Nash, Jr., Evaluation of Risk in Competitive Negotiated Procurements: A Key Element in the Process, 5 N&CR ¶ 22, at 63 (Apr. 1991). See also Questech, Inc., B-236028, Nov. 1, 1989, 89-2 CPD ¶ 407; Pan Am World Services, Inc., B-235976, Sep. 28, 1989, 89-1 CPD ¶ 283.

Engineers<sup>543</sup> and the U.S. Air Force<sup>544</sup>. If an automated data system were to be initiated, now is the opportune time to do so because of the new tasking by OFPP to compile and use past performance information on all source selections exceeding \$100,000 in value<sup>545</sup>.

A system for compiling environmental contractors, past performance on Federal contracts could be based upon the mandatory performance evaluation reports used in construction contracts<sup>546</sup>. Under that provision, the contracting agency must prepare a written evaluation of the contractor's performance, Standard Form 1420, at various times during the performance phase<sup>547</sup>. Provisions are made to insure the contractor has the opportunity to review the reports and rebut any discrepancies<sup>548</sup>. Under the present regulation, COs are encouraged to consider these performance reports prior to making a responsibility determination<sup>549</sup>, but is not required.

It should be obvious, however, that such a data base

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<sup>543</sup> The U.S. COE system has been used to collect input from the CO's and other agency staff regarding their evaluation of a contractor's past performance on DOD construction and renovation type projects.

<sup>544</sup> Nash, supra note 541, at 63.

<sup>545</sup> See infra at Part III.E.3.

<sup>546</sup> FAR 36.201 [FAC 84-12, FAC 84-53].

<sup>547</sup> FAR 36.201(a)(2) [FAC 84-12, FAC 84-53].

<sup>548</sup> FAR 36.201(a)(3) & (b) [FAC 84-12, FAC 84-53].

<sup>549</sup> FAR 36.201(c)(2) [FAC 84-12, FAC 84-53].

would be only a tool for the CO procuring contractors for environmental projects. Information in a data base cannot substitute for the CO's independent judgment and discretion. A compiled history of a contractor's past performance on other Federal environmental contracts could be useful as a starting point for the CO's research. Using the information in the compiled data, the CO could contact the contracting agencies on those previous contracts and inquire about the strengths and weaknesses of the contractor's performance.

Such an initiative faces serious concerns and challenges. The data system containing information on the environmental contractors' past performance should be uniformly administered<sup>550</sup>. The input for such a system must be uniformly and consistently gathered. Another obvious challenge to this system would be the monumental task of collecting and maintaining the data in a timely manner. Some commentators have questioned whether such a data system would collapse under its own administrative weight<sup>551</sup>. In addition, any system that can effectively impair a contractor in competing for public contracts must be fairly and

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<sup>550</sup> Uniform administration of such a broad-scale system is easier said than accomplished. What types of contracts should be included in this pool? Only construction contracts, or, should services be included too? What types of services should be included in this data base: asbestos abatement, hazardous waste transport & disposal, refuse collection, demolition? Should it include only DOD's DERP & DOE contracts? Should it also include performance on non-Federal contracts?

<sup>551</sup> Cibinic, supra note 229, at 20.



impartially administered<sup>552</sup>. Finally, securing adequate resources, personnel, and expertise to maintain such a data system are also concerns that need to be addressed. With the drawdown of personnel in the Defense Department the concerns over manpower and funding are likely to be exacerbated.

#### C. EXPANSION OF DEBARMENTS/SUSPENSIONS AND ENVIRONMENTAL PROTECTION AGENCY LISTING

The use of suspension, debarment, and EPA listing are controversial and adversarial means to filter out nonresponsible contractors. According to some commentators the EPA is increasing its use of all three sanctions to disqualify contractors with a history of environmental violations from receiving awards of Federal contracts<sup>553</sup>. As

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<sup>552</sup> As inferred infra at fn. 286, another problem is retaining access to the data compiled. How much of the Government-generated data would be accessible to the contractor? Could the contract agency withhold nonfactual, judgmental reviews or analyses? Could competitors be legally denied all, or part, of the data regarding a successful offeror/competitor? How much of the agency generated compilation is exempt from release as "source sensitive information" in accordance with Interim Rule 32 C.F.R. Subpart 286h, supra note 286? No general, all inclusive rule on release of the data applies. Each request for the data must be evaluated on its own merits. See Cibinic, supra note 229, at 16; OFPP Issues Final Policy On Past Performance Information - Text of Explanatory Portion of OFPP Policy Letter 92-5, supra note 286, at 100,654

<sup>553</sup> DeVecchio & Engel, supra note 426, at 56; Cole supra note 453, at 135. Expanding the application of EPA's Listing sanction to statutes other than the CWA & the CAA is being considered. Among the statutes that may be amended to include authority for contractor listing are the Resource Conservation & Recovery Act (RCRA), the Comprehensive

discussed infra at Part III.E.7.c, the Clean Water Act and the Clean Air Act authorize the EPA to list persons or facilities not complying with environmental laws or regulations. The effect of being listed by the EPA renders the contractor ineligible for any Federal agency contract<sup>554</sup>. Unlike listing, which may be tailored to affect only the specific person or facility listed, suspension and debarment prevents award of Federal contracts to an entire company and, if the circumstances warrant it, all its divisions and subsidiaries<sup>555</sup>. In addition to action by the EPA the DOD agencies can also act to suspend or debar persons or companies, for a variety of reasons, including environmental noncompliance<sup>556</sup>.

Whether "suspension/debarment" and "listing" can be effective as a means of sorting out nonresponsible environmental contractors remains to be seen. For the purposes of any given procurement, whether the prospective contractor is debarred, suspended, or listed by EPA for

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Environmental Response, Compensation, and Liability Act (CERCLA), the Toxic Substances Control Act (TSCA), the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), the Emergency Planning and Community Right-to-Know Act (EPCRA), and the Ocean Dumping Act (Marine Protection, Research, and Sanctuaries Act). Cole, supra. To say that the environmental contract industry views an expansion of suspension and debarment as a threat is an understatement. See Nibley & Onsdorf, supra note 152, at 884.

<sup>554</sup> Cole, supra note 453, at 58.

<sup>555</sup> FAR 9.405; Cole, supra note 453, at 130; Nibley & Onsdorf, supra note 152, at 884.

<sup>556</sup> See generally FAR Subpart 9.4.

environmental noncompliance is a nondiscretionary matter for the CO. Either the prospective awardee appears on a list, rendering it ineligible for award, or it is not on the list. The suspension, debarment or EPA listing is usually accomplished prior to the CO's responsibility determination.

While the use of these heavy sanctions may be increasing, they are reserved for the more egregious "bad actors". The close calls that do not warrant suspension/ debarment or listing by the EPA will remain for the CO to address. At best, suspension/debarment and EPA listing are supplemental sources of information to augment the authority of the CO. They will not replace the discretionary judgment of the CO to review and balance the evidence of responsibility, and make the difficult decision.

#### D. ARCHITECT-ENGINEERING TYPE SELECTION PROCESS

As noted infra at Part II.C, architect-engineering (A-E) services are used in the preparation and design of remedial action plans for hazardous waste cleanup<sup>557</sup>. Professional A-E services are acquired by a unique selection process authorized by statute<sup>558</sup>. Selecting A-E firms is

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<sup>557</sup> AFR 88-31, ¶ 1.h (4 Oct. 1985).

<sup>558</sup> The Brooks Act, 40 U.S.C. §§ 541 et seq., (1972), as amended by Pub. L. 100-656 § 742, 102 Stat. 3583 (1988), and Pub. L. 100-679 § 8, and implemented by FAR Subpart 36.6. See generally W. Noel Keyes, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATION, Chapter 36 (1986).

accomplished by a hybrid process. The procedure for A-E source selection is unlike the sealed bidding, competitive negotiations, or the two-step<sup>559</sup>.

Award of an A-E contract is based upon demonstrated competence and qualification, rather than the lowest price<sup>560</sup>. After the solicitation phase, a "preselection board" reviews the qualifications of competing A-E firms, ranks them, and then submits this preliminary ranking to the "selection board"<sup>561</sup>. There, the top-rated firms, as ranked by the preselection board, are reexamined<sup>562</sup>. The selection board then reports to the "selection authority" its recommended ranking of the top three to six firms. Upon approval of the list by the selection authority, the CO begins negotiating the fee with the top rated firm<sup>563</sup>. If the top rated A-E firm and the CO cannot agree upon a fair and reasonable fee, the CO must break off negotiations and initiate negotiations with the next ranked firm on the approved list. This process continues until satisfactory terms are concluded with one of the firms on the selection

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<sup>559</sup> FAR 36.103 [FAC 84-5].

<sup>560</sup> FAR 36.602-1; Natural & Technological Hazardous Mgmt. Consulting, B-249124, Oct. 28, 1992, 92-2 CPD ¶ 292.

<sup>561</sup> FAR 36.601(a); FAR 36.603; DFARS 236.601(S-70); Mounts Engineers, Inc., B-218489.4, Apr. 14, 1986, 86-1 CPD ¶ 358.

<sup>562</sup> AFR 88-31, ¶ A1-5.

<sup>563</sup> FAR 36.606(a); FAR 36.602-3[FAC 84-53]; FAR 36.602-4: AFR 88-31, ¶ A1-8; Ward/Hall A/A, B-226714, June 17, 1987, 87-1 CPD ¶ 605.

list<sup>564</sup>. The CO has great discretion in the A-E selection process and the GAO will only review agency decisions where the decision was unreasonable or not consistent with the criteria listed in the solicitation<sup>565</sup>.

One of the attractions of this process is the responsibility of the A-E firms as an inherent factor in the source selection process<sup>566</sup>. Evaluation of past performance is implicit in the process<sup>567</sup>. In other words, past performance, technical expertise, and demonstrated competence are automatically built into the evaluation criteria<sup>568</sup>. The

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<sup>564</sup> FAR 36.606(f); Henderson Design Group, B-248973.3, Dec. 11, 1992, 92-2 CPD ¶ 406; Dworsky Assoc., B-248216, June 18, 1992, 92-1 CPD ¶ 533; Asbestos Management, Inc., B-237841, Mar. 23, 1990, 90-1 CPD ¶ 325; Inca Engineers, Inc., B-236406, Oct. 23, 1989, 89-2 CPD ¶ 371; Oceanprobe, Inc., B-221222, Feb. 26, 1986, 86-1 CPD ¶ 197. The amount of the fee that may be paid to the A-E firm for producing & developing the designs, plans, drawings, and specifications for a project is limited by statute to 6% of the predetermined estimated construction cost of a particular project, or part of the project, to which the A-E work applies. 10 U.S.C. § 9540 (1980).

<sup>565</sup> 4 C.F.R. § 21.3(m)(10) (1991); Con Ce Co Engineering, Inc., B-250666, Feb. 3, 1993, 93-1 CPD ¶ 98; James W. Hudson & Assoc., B-243277, July 5, 1991, 91-2 CPD ¶ 29; Nomura Enterprises Inc., B-236217, Nov. 7, 1989, 89-2 CPD ¶ 437; Engineering Sciences, Inc., B-226871, July 29, 1987, 87-2 CPD ¶ 109; Albert C. Martin & Assocs., B-221746, Apr. 7, 1986, 86-1 CPD ¶ 343; Y.T. Huang & Assocs., Inc., B-217122, Feb. 21, 1985, 85-1 CPD ¶ 220; Arix Corp., B-195503, Nov. 6, 1979, 79-2 CPD ¶ 331.

<sup>566</sup> FAR 36.602-1(a).

<sup>567</sup> Tierra Engineering Consultants, Inc., B-222616, Aug. 12, 1986, 86-2 CPD ¶ 180; Page, Anderson, & Turnbull, Inc., B-223849, Oct. 14, 1986, 86-2 CPD ¶ 427.

<sup>568</sup> FAR 36.602-1(a)(4) [FAC 90-5]; DFARS 236.602-1(S-70). See also FAR 36.603; FAR 36.604 [FAC 90-4]; FAR 53.301-254; FAR 53.301-255.

contracting agencies are required to consider past performance in terms of cost, quality of work, and compliance with performance schedules<sup>569</sup>.

A-E types of source selections have been used for the PA/SI and RI/FS services. Remedial action, on the other hand, is procured by the traditional methods detailed in Part III. If A-E source selections work so well at integrating the concept of responsibility into the evaluation process, why should the CO not use the same procedures for remediation and other environmental services? Part of the reason the A-E type of source selection procedures have not been expanded to include selection of firms actually doing the cleanup effort springs from the fact that the implementation of the specific statutory authority has limited the application of the A-E hybrid selection process<sup>570</sup>. The Act limits the A-E

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<sup>569</sup> Tierra Engineering Consultants, Inc., B-222616, Aug. 12, 1986, 86-2 CPD ¶ 180. Proposed changes to FAR Subpart 36.6 will add a new concern regarding the environment in projects at the design stage. On 25 March 1993 the FAR Changes Committee of the FAR Council recommended changes to implement the OFPP Policy Letter 92-4, ¶ 11. Among the changes recommended is the proposal to require evaluation boards to evaluate A-E firms' "demonstrated success in prescribing the use of recovered materials & achieving environmental soundness & energy efficiency in facility design. See Proposed FAR clauses 36.601-3, 36.602-1, & 36.602-3. For a thorough analysis of these proposed changes to the FAR see James L. Conrad, "BUYING GREEN": IMPLEMENTATION OF ENVIRONMENTALLY-SOUND PURCHASING REQUIREMENTS IN DEPARTMENT OF DEFENSE PROCUREMENTS, (1993) (unpublished LL.M. thesis, The National Law Center, The George Washington University).

<sup>570</sup> FAR 36.209; Contracting Engineers' Council of Metropolitan Washington, B-211553, Nov. 7, 1983, 84-1 CPD ¶ 92; Ninneman Engineering, B-184770, May 11, 1976, 76-1 CPD ¶ 307, reconsidered at 77-1 CPD ¶ 171.

procedures to obtaining plans and designs for the overall project. Construction, remediation, cleanup efforts, and transporting and disposing of waste materials do not fit the narrow exception to CICA carved out by the Brooks Act. In addition, there are other obstacles to expanding the use of A-E selection procedures to environmental construction and remediation-related services<sup>571</sup>.

Specific Congressional authorization would be required to expand A-E source selections to include environmental construction or services. Not only does this seem unlikely, but probably unnecessary. Use of the four-step selection process, which was discussed infra at Part III.B.4, could offer the better alternative.

#### E. EXPANDED USE OF THE FOUR-STEP PROCESS

The single alternative that appears to offer the most probability of making a positive impact in the responsibility determination of prospective environmental contractors is the four-step selection process. The four-step process offers the advantages of the A-E by incorporating technical expertise,

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<sup>571</sup> Specific statutory restrictions on the use of A-E contracts render it unsuitable for most remediation work. Fees paid to firms selected under the A-E process cannot exceed 6% of the estimated cost of the overall project. 10 U.S.C. §§ 9540 & 2306. Monetary ceilings are placed on contract values and the amount per order when used in an indefinite delivery/ indefinite quantity contract. AFR 88-31, ¶ 2g(2)(c), & AFFARS 26.691-2(g). Obligations on an A-E contract that exceed \$300,000 are subject to a 21 day hold and must be reported to Congress. 10 U.S.C. § 2807(b).

competence and performance capabilities into the evaluative selection process, without the need for special Congressional legislation. The disadvantages of the four-step include the additional time to conduct the selection, and having contracting personnel adequately experienced to conduct the process.

The four-step process could be tailored for technically complex, large scale, high risk remediation projects<sup>572</sup>. The evaluation could give additional weight to proposals that incorporate innovative uses of technology and workforce, emphasize past performance and present capability, and highlight technical expertise. Only after the proposed selectee is identified would the fee be negotiated<sup>573</sup>, thereby emphasizing the capability the offeror and technical merits of proposal prior to the price. Such a selection process places the priority on selecting the best firm for the job, as opposed to choosing merely an adequate firm that is willing to charge less than its rivals.

#### F. EXPANSION OF THE IN-HOUSE CAPABILITY OF THE MILITARY SERVICES

Another possible approach to avoid the problem of responsibility determinations is to expand the in-house

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<sup>572</sup> DFARS 215.613-70(b). See infra at Part III.B.4.

<sup>573</sup> DFARS 215.613-70(i).



capabilities of the military departments to perform their own remediation. Utilizing the agencies' own organic capabilities could decrease DOD's risks inherent in relying on the private sector for environmentally sensitive cleanup projects. While expansion of the military resources is probably not a viable alternative in the near future, discussion of the option is a valuable means of contrasting the private industry and the government's in-house resources.

Currently DOD has some units dedicated to environmental remediation. For example, the U.S. Air Force maintains a squadron in Alaska that performs various environmental tasks throughout that region. The 11th Civil Engineering Operational Squadron (CEOS), formerly the 5099th CEOS, is stationed at Elmendorf AFB, Anchorage Alaska. That unit provides engineering, restoration, and various environmental services at active and inactive DOD sites in the Pacific region. Their capability includes asbestos and PCB surveys and abatement, demolition and removal of petroleum storage tanks, and well drilling for monitoring and recovery<sup>574</sup>. Most of their efforts are funded by DERA<sup>575</sup>. By way of

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<sup>574</sup> Through fiscal year 1991 11th CEOS performed demolition of 197 underground storage tanks and above ground storage tanks which had the combined capacity of 6,615,560 gallons, removed 6,258 PCB contaminated transformers, stockpiled 1,120,000 lbs. of PCB contaminated soil for remediation, disposed 1,105,000 lbs. of hazardous waste solids, disposed 7,708,095 discarded batteries and associated waste. Coullahan, supra note 151.

<sup>575</sup> Coullahan, supra note 151. The 11th CEOS also performs remediation activity for other departments, DOD and non-DOD. Those activities have been funded under the Economy

illustrating the units capabilities, one of the 11th CEOS's success stories was the removal of 26,000 drums of hazardous waste at the U.S. Air Force's alert facility at King Salmon, Alaska<sup>576</sup>.

Successful as such in-house units are, could they be expanded to augment the contractor services? Two obvious impediments arise immediately. First, the drawdown of forces and cuts in the funding of the military budgets may make organizations like the 11 CEOS an endangered species. Second, units like the 11 CEOS rely upon a cadre of highly trained military and civil service personnel with years of specialized expertise and training. Whether such expertise can be expanded to garner a larger share of the remediation effort is doubtful. In fact, the military departments will probably find it increasingly difficult to retain personnel with such marketable skills<sup>577</sup>.

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Act. 31 U.S.C. § 1535, which allows the transfer of funds between agencies as reimbursement for services performed by one agency at the request of another. See FAR Subpart 17.5; Robert L. McGrath, An Introduction to Fiscal Law in Government Contracting, 29 A.F.L. Rev. 207, 209 (1988).

<sup>576</sup> Id.

<sup>577</sup> In September 1991 the DERP Task Force recommended that DOD make a concentrated effort to retain its engineers, scientists, and contract specialists. DERP Staff Suggests Cleanup Changes in Name of Unhappy Task Force, supra note 36. No reference was made to retention of the DOD's contract & environmental attorneys.

## CONCLUSION

Congress has mandated that DOD shall take necessary action to remediate existing and formerly used DOD facilities that have released, or threaten to release, hazardous substances. A substantial part of the campaign to clean up these sites relies upon private contractors hired by the various agencies in DOD. The military departments must use full and open competition to select its contractors. A critical aspect of the selection process is determining whether the prospective contractor has the present capability and willingness to complete its contractual obligations. How this responsibility determination is made varies depending upon the type of source selection process utilized by the contracting office.

An argument can be made that the regulations as they now exist provide sufficient authority and adequate means for the Contracting Officer to determine whether a prospective contractor for an environmental project is responsible. The limits of the CO's discretion on any particular procurement is dictated in part by the type of selection process being used.

The sealed bidding procedure is required where no discussion with the bidders is needed and where cost and cost-related factors are the only selection criteria. When using sealed bidding, the CO has no flexibility to consider the relative merits of each bidder's elements of responsibility. Since award of a contract under the sealed bidding process

goes to the low-priced, responsive bid, the responsibility of that bidder is determined after the bids have been opened and the array of bids is open to public review. The responsibility determination is, at that point, limited to an "acceptable" or "not acceptable" standard. If the low-priced responsive bidder meets the minimal level of responsibility, it is the awardee. Such limitations may be too onerous for the agency trying to select the most appropriate environmental construction or services contractor. Use of sealed bids is probably not the preferred method for obtaining environmental construction or services. However, some flexibility can be inserted into the sealed bids through the use of special standards tailored for the individual procurement.

Where factors other than price are important, and where discussions with the offerors are necessary, the competitive proposal procedure is the more appropriate method of procurement. Competitive proposals allow the agency to insert responsibility related criteria to be evaluated during the selection process. In addition, competitive negotiations offer the flexibility of discussions between the SSET and the offeror concerning details of the proposal. The competitive proposal process is more likely to provide the agency the opportunity to review the relative strength and weaknesses of the competing offerors' capabilities. The competing offerors can highlight their prior accomplishments and explain any performance shortfalls. The SSET may balance the price against the comparative merits of the proposals. Now with the

new OFPP policy in effect, past performance, one of the elements of responsibility, is a required evaluation factor in all Government contracts that are expected to surpass \$100,000. In light of the flexibility it provides to the SSET and the offerors, the competitive proposal process should be the more appropriate method of source selection, where sealed bidding is not required. In cases where there is a special need to determine whether the prospective awardee has the technical expertise necessary to complete the work, the two-step or the four-step method may be the preferred alternative.

This is not to suggest that the process of determining contractor responsibility cannot be improved. Whether such changes should include a centralized computer data base or a new, as yet undeveloped, method for selecting environmental cleanup firms is speculative. Already the EPA has decided to more aggressively assert its authority to suspend, debar, and list contractors with a history of violations of environmental laws and regulations. Whether this new EPA policy will have a chilling effect on competition remains to be seen. One thing is certain. There is no substitute for a contract officer's fully informed, adequately documented, up-to-date review of the prospective contractor's capability and willingness to perform the pending contract.

Fully investigating a contractor's past performance is not a punitive effort by the agency. It should not be performed with that intent. The responsibility determination process will likely be counterproductive when pursued in an

aggressive, adversarial manner. Successful, honest contractors in the environmental construction and services business should not fear having their capabilities evaluated. In the negotiated proposal process, clarifications can be made, deficiencies noted and addressed, and past problems explained or corrected. If the evaluation of the offerors' responsibility is conducted in a fair and even handed manner, the needs of the government will be more closely met and competition will likely reward those that are best suited for success<sup>578</sup>.

Everyone has a stake in the Government's effort to award contracts for remediation services only to responsible contractors. The taxpayer wants to see the most effective use of Federal funds in the DOD remediation effort. Responsible contractors want a fair opportunity to compete for the growing number of DOD cleanup contracts. The contracting agency wants successful performance on its environmental contracts. The agency should also be concerned with minimizing unnecessary risks of liability under CERCLA and state laws, as exemplified in Dickerson, Inc. v. U.S.<sup>579</sup>, by prudently and diligently

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<sup>578</sup> Selecting a responsible contractor to perform environmental remediation or other environmental services is only part of the equation. The administrative contracting officer must diligently oversee the awardee's performance. At the very least, the ACO's staff should observe contractor performance, ensure that all forms and manifests are properly executed and accounted for (where the transportation of hazardous waste is involved), and ensure that the contractor's employees and subcontractors comply with all Federal and state guidelines.

<sup>579</sup> See infra at Part II.D.

reviewing all available, relevant material regarding the apparent awardee's responsibility.

The legacy of environmental damage from the industrialization in other societies is apparent. The United States is among the first nations to undertake the monumental task of remediating their past damage to the environment. The military has acknowledged its role in causing the damage to the ecosystem and is aggressively incorporating compliance into its operations. In addition, it is committed to cleaning up its present sites, as well as its former sites. Whether this effort is successful will depend upon the commitment of the people of the United States to continue to dedicate funds to the effort. DOD can encourage confidence in its cleanup effort by maximizing the effectiveness of each dollar spent on remediation while providing participatory contractors a fair opportunity to compete for the opportunity to "move dirt".

## APPENDIX

### GLOSSARY OF TERMS

ACO - ADMINISTRATIVE CONTRACTING OFFICER  
A-E - ARCHITECT-ENGINEER  
AFFARS - U.S. AIR FORCE FEDERAL ACQUISITION REGULATION  
SUPPLEMENT  
ARAR - "APPLICABLE" OR "RELEVANT AND APPROPRIATE"  
REQUIREMENTS

BAFO - BEST AND FINAL OFFER

CAA - CLEAN AIR ACT  
CERCLA - COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION,  
AND LIABILITY ACT  
CICA - COMPETITION IN CONTRACTING ACT  
CO - CONTRACTING OFFICER  
COE - U. S. CORPS OF ENGINEERS  
COC - CERTIFICATE OF COMPETENCY  
CPD - COMPTROLLER GENERAL DECISIONS  
CR - COST REIMBURSEMENT CONTRACT  
CWA - CLEAN WATER ACT

DAC - DEFENSE ACQUISITION CIRCULAR  
DA PAM - DEPARTMENT OF ARMY PAMPHLET  
DCASMA - DEFENSE CONTRACT SERVICE MANAGEMENT AREA  
DERA - DEFENSE ENVIRONMENTAL RESTORATION ACCOUNT  
DERP - DEFENSE ENVIRONMENTAL RESTORATION PROGRAM  
DFARS - DEPARTMENT OF DEFENSE FAR SUPPLEMENT  
DLA - DEFENSE LOGISTICS AGENCY  
DLA FAR SUPP - DLA FAR SUPPLEMENT  
DOD - DEPARTMENT OF DEFENSE  
DOE - DEPARTMENT OF ENERGY  
DPDS - DEFENSE PROPERTY DISPOSAL SERVICE  
DRMS - DEFENSE REUTILIZATION & MARKETING SERVICE

EPA - ENVIRONMENTAL PROTECTION AGENCY

FAC - FEDERAL ACQUISITION CIRCULAR  
FAR - FEDERAL ACQUISITION REGULATION  
FP - FIXED PRICE CONTRACT

GAO - GENERAL ACCOUNTING OFFICE  
GSBCA - GENERAL SERVICES BOARD OF CONTRACT APPEALS

HSD - HUMAN SYSTEM DIVISION  
HTW - HAZARDOUS AND TOXIC WASTE  
HWT & D - HAZARDOUS WASTE TREATMENT & DISPOSAL



IFB - INVITATION FOR BIDS  
IRP - INSTALLATION RESTORATION PROGRAM  
  
N&CR - NASH & CIBINIC REPORT  
NAV FAR SUPP - U.S. NAVY FAR SUPPLEMENT  
NPL - NATIONAL PRIORITIES LISTING  
  
OFPP - OFFICE OF FEDERAL PROCUREMENT POLICY  
  
PA/FS - PRELIMINARY ASSESSMENT/SITE INVESTIGATION  
PAS - PRE-AWARD SURVEY  
PCB - POLY-CHLORINATED BIPHENYLS  
PPI - PAST PERFORMANCE INFORMATION  
  
RI/FS - REMEDIAL INVESTIGATION/FEASIBILITY STUDY  
RCRA - RESOURCE CONSERVATION AND RECOVERY ACT  
RFP - REQUEST FOR PROPOSALS  
ROD - RECORD OF DECISION  
  
SABER - SIMPLIFIED ACQUISITION OF BASE ENGINEERING  
          REQUIREMENTS  
SARA - SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT  
SBA - SMALL BUSINESS ADMINISTRATION  
SSA - SOURCE SELECTION AUTHORITY  
SSET - SOURCE SELECTION EVALUATION TEAM